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No. 1031

In the Supreme Court of the United States

OCTOBER TERM, 1968

MARVIN J. MORSE,
Petitioners,

vs.

D. A. HINDMAN, et al,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit and to the Supreme Court of the State of Kansas

Petition

MARVIN JAMES MORSE
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No. .....

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Petition

The pro se petitioner, Marvin J. Morse, prays the Supreme Court grant writs of Certiorari to review:[1]

1. The additional respondents hereinafter mentioned in this petition for certiorari and against whom petitioner is asserting adverse claims to real property are: Pauline Hindman; Charley A. Lynd; Elida Lynd; Tomlinson-Kathol, Inc.; William T. Kemper; Ray H. Quackenbush; Eugene Crabtree; Frank E. Hedrick; Theodore Carter; Jim Donham; E. Davis Hickman; Jessie I. Wilcoxen; Mobil Pipeline Company; Producers Gas Equities, Inc.; Warren E. Tomlinson; Gerold J. Kathol; Oread Oil Company, Inc.; Joe Hickman; Jones, Shelburne and Former, Inc.; Barton Oil Company; Charles W. Aikens, James W. Owens; Russel Cobb, Jr.; Lydea E. Kearns.
The additional parties plaintiff in the Federal Court asserting rights as heirs of testator but not parties to this petition are: Mar-

1. The order of the United States District Court for the District of Kansas, (at Topeka) entered on October 11, 1968, granting a stay of the pending case, *Shepard v. Hindman,* and the order entered July 3, 1968 denying summary judgment. (Rec. p. 15 and 8)

2. The order of the Kansas Supreme Court entered on 29 Jan. 1969 in *Hindman v. Shepard,* denying petitioner's Motion to Dismiss for Lack of Jurisdiction. (Rec. p. 29)

3. The judgment of the United States Court of Appeals for the Tenth Circuit entered on November 12, 1968, in *Morse v. The District Court of Rooks County, Kansas,* wherein the Circuit Court denied petitioner's application for a writ of Prohibition and/or Injunction to restrain the State Court from exercising IN REM Jurisdiction over real property in the exclusive jurisdiction of the Courts of the United States. (Rec. p. 30)

CITATIONS TO OPINIONS

The various orders and rulings of the United States District Court for the District of Kansas in *Shepard v. Hindman* are unreported but those relevant to this petition are set out in the Appendix hereto at Pages 21 to 29.

The order of the Kansas Supreme Court in *Hindman v. Shepard* is unreported but is set out in the Appendix hereto at Page 29.

The Judgment of the United States Court of Appeals for the Tenth Circuit in *Morse v. The District Court of Rooks*

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garet Christensen; Bernadine Scott; Harold A. Morse; Ralph L. Morse; Donald E. Morse; E. Rhaecilla Hanzen; Catherine M. Ransom; Shirley Y. Hendersen; Anna Alley; Barbara Hillman; Elida Merritt; Laura Merritt; Francis Gfeller; and Myron Gfeller as Conservator of the Estate of Mary Catherine Shepard, deceased.

County, Kansas, will be reported but has not yet been published and is set out in the Appendix hereto at Page 30.

JURISDICTION

The judgments in the cases sought to be reviewed herein are as follows:

1. In the United States District Court for the District of Kansas in *Shepard v. Hindman.*

(a) On July 3, 1968, the Court entered an order denying petitioners Motion for Summary Judgment, which is not an appealable order (App. p. 8).

(b) On September 25, 1968, the Court entered an order denying a rehearing of an earlier motion for an injunction and was in effect an order denying an injunction against the State Court (App. p. 13).

(c) On October 11, 1968, the Court entered an "Order Granting Stay" of its proceedings and, in effect, enjoined petitioner (and co-plaintiffs) from further proceedings in Federal Court (App. p. 15).

Thereafter, on October 25, 1968, petitioner filed a $250.00 cash bond (Rec. p. 245) and Notice of Appeal (Rec. p. 242) to the Circuit Court seeking appellate review of those three orders; on November 4, 1968, request was made for a transcript (Rec. p. 246); on November 25, 1968, less than forty days from filing notice of appeal, the motion for additional time to docket record on appeal was filed and the order granting additional time, up to January 22, 1969, was filed by the Court the same day (App. 20); the Clerk of the District Court transmitted the certified copies of designated portions of the record to the Appellate Court on January 16, 1969, and the appeal, with the record, was docketed on January 22, 1969, in the United States Court of Appeals for the Tenth Circuit. (Rec. p. 1).

The jurisdiction of this Court is conferred by Title 28 U.S.C. Section 1254(1).

2. Petitioner docketed the appeal from the orders of the State District Court, in *Hindman v. Shepard,* in the Kansas Supreme Court on January 17, 1969, along with a "Motion to Dismiss for Lack of Jurisdiction" supported by certified copies of a "Record for Intermediate Hearing." (Records p. 1,023)

On January 29, 1969, the Kansas Supreme Court entered an order denying the motion without arguments (App. p. 29b) this order denying a motion to dismiss is sufficient evidence that the highest Court in the State of Kansas intends to exercise in REM jurisdiction over the disputed property. The jurisdiction of this Court to review by writ of certiorari the order of the state Court is conferred by Title 28 U.S.C. 1257(3).

3. The judgment of the United States Court of Appeals for the Tenth Circuit in *Morse v. The District Court of Rooks County, Kansas,* was entered on November 12, 1969, a rehearing was not requested and petitioner has until February 10, 1969, to docket a petition for certiorari review thereof.

The Jurisdiction of this Court is conferred by Title 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Can a State Court acquire jurisdiction over real property by the filing therein of a petition to quiet title by parties who have been served a summons and complaint by a United States Marshal and appeared as defendants in an in REM suit in ejectment involving the same property, filed in a United States District Court of concurrent jurisdiction, by parties who are named as defendants in the State Court proceedings.

2. Does Title 28 U.S.C. 2283 deny the courts of the United States the power to issue and enforce writs of prohibition and/or injunctions to restrain State Courts of concurrent jurisdiction from attempting to exercise IN REM jurisdiction over real property that is under the prior custody, control and jurisdiction of the courts of the United States.

3. Can the Courts of the United States, both District and Appellate, refuse to exercise the power conferred on them by Title 28 U.S.C. 1651 and deny an application for an injunction to restrain or prohibiting a state court from attempting to exercise in REM jurisdiction over real property in the exclusive and prior jurisdiction of the Courts of the United States.

4. Can the Courts of the United States with full and complete jurisdiction over all of the adverse claimants of record to described real property that is under its prior jurisdiction, custody, and control, after the issues have been made up, motions for summary judgment by both parties plaintiff and parties defendant have been submitted, argued and ruled on, then enter orders admitting purported findings and judgments, that are not final proceedings, from a suit before a State District Court, involving only part of the parties, and abate the proceedings before it with the announced intention of withholding exercise of its authority until the State Court rulings can be set up as res judicata.

5. Is the filing of a petition to quiet title in a State court by one who is a defendant and against parties plaintiff in a Federal Court suit in ejectment involving the same property the equivalent of malicious prosecution.

6. Does a warranty deed from a life-tenant and wife to a third party, executed in conjunction with and subject to

the terms of a separate contract which recognizes the fact that the grantor will bring suit against the remaindermen and specifies that if the suit clears the title then grantee will reconvey mineral interest in the property conveyed to the life-tenant, but, in the event the suit fails to clear the title then grantee will reconvey to grantors and grantors will reimburse grantee all money expended (1) create a mortgage on the property which the remaindermen can redeem after the death of the life-tenant and/or (2) create a champertous transaction which the remaindermen can vacate after the death of the life-tenant. (App. pp. 33 and 34)

7. Will summary judgment lie in favor of a party asserting legal title as beneficiary of a testementary trust with immediate rights of possession and against parties asserting an equitable title of bona-fide purchaser, laches, and estoppel under a chain of title originating with a life-tenant and supported by a judgment void on its face.

STATUTES INVOLVED

Constitution of the United States:

Article III. Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . . .

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, ...

Article IV. Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States. . . . .

Amendment V. No person shall be . . . . . deprived of life, liberty, or property, without due process of law; . . . .

Amendment XIV. Section 1 . . . . . No State shall make

or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

Title 42 U.S.C. Section 1981. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to not other.

Title 42 U.S.C. Section 1983. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 42 U.S.C. Section 1985 (2). If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, ... or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating in any manner, the due course of justice in any State or

Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws; . . . . .

Title 15 U.S.C. Section 77v. (a). The district courts of the United States, and the United States Courts of any territory, shall have jurisdiction of offenses and violations under this subchapter . . . . . and concurrent with State and Territorial courts of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter . . . . .

28 U.S.C. Section 1332 (a). The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between (1) Citizens of different states.

Title 28 U.S.C. Section 1343. The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . . .

(3) to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States . . . . .

Title 28 U.S.C. Section 2283. A court of the United States may not grant an injunction to stay proceedings in

a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Title 28 U.S.C. Section 1651. (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law . . . . .

Title 28 U.S.C. Section 1254. Cases in courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case; before or after rendition of judgment or decree.

Title 28 U.S.C. Section 1257. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the constitution, treaties or laws of the United States, *or where any title, right, or privilege or immunity is specially set up or claimed under the* Constitution, treaties, or *statutes of,* or commission held or authority exercised under, *the United States.*

Fed. Rule #60 (b) (4) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reason.

(4) The judgment is void . . . . . This rule does not limit the power of the court to entertain an independent

action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in section 60-309 or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill in review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

RELEVANT STATE STATUTES

KSA 60-1001. Actions for possession; ejectment. (a) *Petition.* In any action to recover possession of real property, including an oil or gas lease or mineral interest, it shall be sufficient if the petition state that the petitioner has a legal or equitable interest therein and the right to possession.

(b) *Tenants in common.* In an action against a tenant in common the petition must state that the defendant either denied plaintiff's right, or did some act amounting to such denial . . . . .

KSA 33-106. No action shall be brought whereby to charge a party upon any special promise to answer for the debt, default or miscarriage of another person . . . . . or upon any contract for the sale of lands, tenements, or hereditaments, or any interest in or concerning them . . . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized in writing.

KSA 60-259. New trial, amendment of judgments: (a) Grounds. A new trial may be granted to all or any of the

parties on all or part of the issues when it appears that the rights of the party are substantially affected:

First. Because of abuse of discretion of the court, misconduct of the jury or party, or accident or surprise which ordinary prudence could not have guarded against, or for any other cause whereby the party was not afforded a reasonable opportunity to present his evidence and be heard on the merits of the case.

Second. Erroneous rulings or instructions of the court.

Third. That the verdict, report or decision was given under the influence of passion or prejudice.

Fourth. That the verdict, report or decision is in whole or in part contrary to the evidence.

On motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, and direct the entry of a new judgment.

(b) *Time for motion.* A motion for a new trial shall be served and filed not later than ten (10) days after the entry of the judgment except for good cause shown the judge may extend the time an additional twenty (20) days.

(f) *Motion to alter or amend a judgment.* A motion to alter or amend the judgment shall be served and filed not later than ten (10) days after entry of the judgment . . . . .

STATEMENT OF THE CASE

Because each case relates to the other petitioner will first set out and identify each.

THE FEDERAL EJECTMENT CASE

The official style and title of this case is *Marvin J. Morse v. D. A. Hindman, et al, Case No. 20-69* in the United States Court of Appeals for the Tenth Circuit and is on appeal

from the United States District Court for the District of Kansas (at Topeka) where it was filed on March 3, 1966, as *Mary Catherine Shepard and Margaret Christensen, on behalf of themselves and all others similarly situated, v. D. A. Hindman; Charley A. Lynd; et al, Civil Action No. T-3987*

The jurisdiction of the Federal District Court was invoked because of diversity of citizenship, plaintiffs Catherine Shepard and Margaret Christensen being citizens of Oregon and Utah respectively and defendants being citizens of Kansas, Missouri, California, and one Texas corporation, and because the jurisdiction amount exists.

THE STATE QUIET TITLE CASE

The official style and title of this case is *D. A. Hindman and Charley A. Lynd v. Mary Catherine Shepard, et al, Case No. 45622,* in the Supreme Court of the State of Kansas and is on appeal from the District Court of Rooks County, Kansas, where it was filed on October 28, 1966, as *D. A. Hindman v. Mary Catherine Shepard, et al, No. 9873* and names therein all of the members of the class (heirs) as defendants. On March 8, 1967, an Answer and Cross Petition of Mary Catherine Shepard was filed and paragraph 44 therein alleges "That on February 3, 1966, defendants Mary Catherine Shepard and Margaret Christensen filed an action in Federal District Court, Topeka, Kansas, Case T-3987, claiming the fee simple title to all of this property against all known adverse claimants." (Rec. p. 1,047) on April 3, 1967, plaintiffs answered the cross claim and paragraph #40 therein states, "Plaintiffs admit the allegation of paragraph 44 that defendants Mary Catherine Shepard and Margaret Christensen on February 13, 1966, filed an action in Federal District Court in Topeka, Kansas, Case No. T-3987. All other allegations of said paragraph are denied. (Rec. p. 1,060)

Throughout the proceedings in state court petitioner made numerous objections to the courts jurisdiction and on January 3, 1969, filed a Motion to Vacate and Set Aside All Orders, Findings, Conclusions and Judgments and Motion to Dismiss for Lack of Jurisdiction. (Rec. p. 1,101) On January 13, 1969, oral arguments were heard and at that time petitioner introduced certified copies of the original petition (complaint) filed in the Federal Court on March 3, 1966; the Order Granting Stay by the court on October 11, 1968; Notice of Appeal filed on October 25, 1968; and the Order for Transmittal of Original Exhibit filed on December 2, 1968, and thereby judicially appraised the state court that the Federal Court proceedings were in rem, over the same property and between all of the parties in state court (Rec. p. 1,106 to p. 1,129).

On January 13, 1969, the district court overruled the motion to dismiss, (App. p. 28b). On January 15, 1969, the Notice of Appeal was filed (Rec. p. 1,104) and on January 17, 1969, a certified copy of a Record for Intermediate Hearing, including the certified Federal proceedings, along with a Motion to Dismiss for Lack of Jurisdiction was filed and the appeal docketed in the Supreme Court of the State of Kansas. (Rec. p. 1,023). The respondents filed a reply to the motion and on January 29, 1969, the court entered an Order Denying the Motion (App. p. 29b).

THE CIRCUIT COURT INJUNCTION CASE

The official style and title of this case is *Marvin J. Morse v. The District Court of Rooks County, Kansas, et al, No. 157-68,* in the United States Court of Appeals for the Tenth Circuit and was filed on November 5, 1968, (Rec. p. 578). No answers were filed and on November 12, 1968, the petition was denied. Jurisdiction was invoked under Title 28

U. S. C. A. Section 1651 with petitioner introducing approximately 400 pages of certified documents from the Federal ejectment case and approximately 120 pages of certified documents from the State quiet title proceedings and a showing that on October 25, 1968, petitioner had filed Notice of Appeal to said court from the district court and that its appellate jurisdiction was actual and not potential.

HISTORY OF THE CASE

In 1925, pursuant to paragraph sixth of his father's Will, George W. Atherton inherited a life estate in the disputed property and his children took a remainder estate vesting at the death of the testator. (Rec. p. 480).

On February 11, 1944, George W. Atherton and his wife, Hattie, purported to convey to Hattie's brother, Charley A. Lynd, title to the trust property. The deed was witnessed by attorney D. A. Hindman and duly recorded (App. p. 32). On February 23, 1944, Charley A. Lynd filed suit against the children of George W. Atherton, his brothers and sisters and all their spouses in *Charley A. Lynd v. Barbara Hillman D.C. Case No. 7807,* filed by D. A. Hindman pursuant to a contingent fee contract.

On April 7, 1944, while the case was still pending, George and Hattie Atherton, with Charley and Elida Lynd, reduced the terms of the conveyance into a written contract, executed by each of them. The contract acknowledged there is a suit to clear the title to the property and in the event the title is cleared then grantee will reconvey to grantors a 2/8 mineral interest but if the title is not cleared then grantees will reconvey to grantors and grantors will reimburse grantees all money expended. (App. p. 33).

The Will of testator was made a part of the petition to show the source of grantor's title, the petition alleges the

Will creates a fee-tail estate and that the deed executed by George and Hattie Atherton conveyed a fee simple title. A default judgment was entered finding that the Will created a fee-tail estate cut off by conveyance "and it so construed" and quieted title in plaintiff. (Rec. p 513 at 514). The day judgment was entered Charley A. Lynd purports to convey 2/8 mineral interest to D. A. Hindman, a 3/8 mineral interest to George and Hattie Atherton, as joint tenants, and retaining a 3/8 mineral interest in himself. (Rec. p 401 & 402).

In 1945 the Hindmans, Lynds and Athertons signed oil leases to Shell Oil Co., one covering the east ½ and another covering the west ½ of the property, these were the first mineral leases recorded on the title. (Rec. p. 403 & 404).

In 1950 George Atherton's brother, Orion, had signed two oil leases on the property described in paragraph fourth of testator's will, the second oil company had their lease ratified by all remaindermen and all parties named in the Will, a law suit resulted that was ruled on by the Kansas Supreme Court in *Wood River Oil Co. v. Madden, Case 169 Kan. 633,* wherein the court found that the will created a life-estate in the first taker with remainders vesting in the children of his body and that the spouse of a deceased vested remaindermen owned a share equal to the other remaindermen and for the purpose of this suit is the "law of the case".

Shell released their lease in 1950 and in 1951 the Hindmans, Lynds and Athertons leased to Jones, Shelburne and Farmer, Inc., again in two leases. The first well went into production on March 4, 1951 (Rec. p. 452) (this suit was filed March 3, 1951, less than 15 years later). Two producing wells were drilled on the east ½ and two dry holes on the west ½, in 1955 both producing wells were

plugged and the leases vacated and the next month Margaret Christensen recorded a mineral conveyance of ¾ of her rights in the property to her then husband, Ried Jewkes. (Rec. p. 419).

By April 12, 1959, the quiet title suit had been of record for 15 years and on November 24, 1959, the Hindmans, Lynds, and Athertons executed a lease to one Albert M. Austin (Rec. p. 30 and 31) who conveyed to Tomlinson-Kathol on March 8, 1960; on March 25, 1960 Margaret Christensen conveyed by Quit Claim Deed to her father, George W. Atherton, the deed and an affidavit showing the death of Ried Jewkes were recorded on the title on March 28, 1960, (Rec. p. 422) and on May 27, 1960, Tomlinson-Kathol went into production (Rec. p. 454). They have drilled seven wells on the property. Well #3 was a dry hole and was located on the east ½ of the property, the other six are producing wells and are located on the west ½ of the property (Rec. p. 452 to 464).

There are two pipelines across the property, Mobil Pipe Line Company purchases the oil and Producers Gas Equities provides natural gas to operate the lease, both leases are signed by Charley and Elida Lynd.

All other respondents herein acquired title by conveyance of mineral interests from or through Tomlinson-Kathol, except for the conveyance to Charles Aikens and J. W. Owens from Austin, as set out in petitioners amended complaint and in the abstract of title (Rec. p. 423 and 424).

On May 14, 1961, the life tenant, George W. Atherton, died testate and his wife, Hattie, was his only heir (Rec. p. 523). On December 25, 1964, Hattie Atherton died testate and her eight living daughters were her heirs (Rec. p. 570). Thus, any interest, either legal or equitable either owned in this property is now the property of the remain-

dermen along with immediate rights of possession of their remainder estate.

On March 3, a "petition" was filed in the Kansas Federal Court by two of the eight sisters asserting immediate rights of possession to described real property and showing that other parties were in possession under a conveyance from the life tenant and the date of his death, requesting that defendants be ejected, that a 1944 judgment purporting to make a judicial construction of the Will be held void for failing to name indispensable parties, that Lynd and Hindman be assessed exemplary damages for practicing fraud upon the court, for an accounting and other relief all within KSA 60-1001, statutory ejectment procedures. (Rec. p. 7).

The defendants set up an equitable defense claiming res judicata, laches, estoppel, bona fide purchaser, and adverse possession. (Rec. p. 17 at p. 21 and p. 24 at p. 28)

On October 21, the Court entered a ruling headed "Special Issue of Class Action Sufficiency" and granted plaintiffs ten days to amend the complaint for themselves individually (App. p. 1).

On October 28, 1966, defendants Hindman and Lynd filed a suit in the State District Court to quiet title to the property naming all of the remaindermen (Rec. p. 1,047).

On April 27, 1967, and March 8, 1968, plaintiffs filed motions to enjoin the state court proceedings which were denied (Rec. p. 48 and 146), and on September 6, 1968, the state court entered judgment for Hindman and Lynd.

On September 9, 1968, the Federal Court admitted the findings and judgments of the state court and denied a motion for rehearing of a motion to enjoin the state court and filed the order on September 25, 1968 (App. p. 13).

On October 11, 1968, the Federal Court abated its proceedings (App. p. 15) and on October 25, 1968, petitioner filed notice of appeal. (Rec. p. 242)

On November 5, 1968, petitioner filed suit in the United States Court of Appeals for the Tenth Circuit asking for an injunction against the State Court that was denied on November 12, 1968 (App. p. 30).

On January 13, 1969, the State Court denied a motion to dismiss (App. p. 29); on January 19, 1969, on appeal for intermediate ruling, the Supreme Court of Kansas denied a motion to dismiss.

Petitioner was substituted into the action as transferee of Mary Catherine Shepard after her death and, on hearing of motion, was granted permission to file an amended complaint, to introduce newly discovered evidence, being the contract to reconvey and on June 14, 1968, when petitioners' motion for summary judgment was heard every person of record claiming adversely to plaintiffs had been served with summons and complaint and appeared by counsel and all of the heirs of testator had been joined by order of the court and either served with summons and complaint or entered an appearance and any decision herein will be a final determination of the rights of all adverse claimants. (Docket sheets rec. p. 367).

That the deed and contract signed by the Lynds and George and Hattie Atherton created a mortgage, even though both parties may have been mistaken as to their respective rights (see *Wiswell v. Simmons,* 77 Kan 622, 95 P 407.)

That all parties who can claim an interest in real property are indispensable parties in a suit to construe a Will is the subject of many Kansas decisions (see *McFadden v. McFaddin* 179 Kan 455).

That the recording of a deed by the grantee is notice to all the world that he is claiming title thereunder is the purpose of the recording statutes, thus Margaret's deed to her husband, then to her father, and the recording thereof was notice that the remaindermen were still asserting rights to the property.

REASONS FOR GRANTING THE WRIT

Petitioner has exhausted both Federal and State Court remedies, all adverse claimants are before the Court and petitioner has no other redress.

Sections 1 and 2 of Article III of the Constitution of the United States and the Acts of Congress passed in pursuance thereto, give citizens of one state the right to bring and maintain a suit in the Federal Court in another state. A citizen who would exercise that right in an in rem proceeding in ejectment is compelled to bring his suit in the Federal Court in the state where the property is situated and where the defendant lives.

The reason for the grant to him by the Constitution of this right to have the decision of his controversy with the citizen of another state by a Federal Court was thereby to avoid the local attachments and prejudices in favor of the defendant that those who made the Constitution feared might injuriously affect the administrations of justice in the state courts against the claims of citizens of other states.

In the exercise of that constitutional right petitioner has invoked the jurisdiction and persistently demanded an adjudication of an in rem controversy and an enforcement of the jurisdiction by the Federal Court that had first acquired jurisdiction over the property.

The same judicial power which grants to a non-resident a Federal right to sue a citizen in a Federal Court operates upon the citizen who is sued and compels him to yield to the exercise by another of that Federal right. The existence of a right to sue in one logically and constitutionally imposes upon the other the obligation to be sued. If the person to be sued can, by any act of his, defeat the Federal right to sue, then the latters rights, though created by the

Constitution, the Supreme law of the law, may be wholly annulled by the caprice or whim of a local citizen.

The Federal obligation to be sued cannot be destroyed or thrown off by an evasive resort to a State Court by the defendant in the Federal Court, after the Federal Court has, by appropriate procedure, acquired jurisdiction, custody and control of the property, the parties and the subject matter, and to permit such a situation to develop would utterly destroy the Federal Constitutional Judicial Power and the non-residents Constitutional rights, and would thereby, to that extent amend our Constitution and the Federal Courts could decide questions offered by non-residents only *by consent of the defendants.*

If the defendants are permitted to prosecute the State Court suit over the objections of petitioner then it would be established that a citizen of a state may remove an in rem suit from Federal Court to State Court.

The acts of the Federal District Court in refusing to issue the injunctions when requested and then abating the proceedings; of the Circuit Court in denying the injunction against the State court; and of the State Court continuing to exercise jurisdiction, over real property after being judicially appraised that the property is in the jurisdiction, custody and control of the Federal Court, are in such direct conflict with the mandates of this Court in the decisions below as to require the Supreme Courts supervisory powers.

In *Toucey v. New York Life Insurance Company* 314 US 118 on page 135 . . . The rank and authority of the (Federal and State) courts are equal but both courts cannot possess or control the same thing at the same time, and any attempt to do so would result in unseemly conflict . . .

And in *Penn Co. v. Pennsylvania 294 US 189* on page 196 . . . But when the two suits have substantially the same purpose and the jurisdiction of the courts is concurrent, that one whose jurisdiction and process are first invoked by the filing of a bill is treated in constructive possession of the property, and as authorized to proceed with the case . . .

In *Covel v. Heyman* 111 US 182 . . . The forebearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided, by avoiding interference with the process of each other, is a principal of comity, with perhaps no higher sanction than the utility which comes from concord; but between State Courts and those of the United States it is something more. It is a principal of right and law, and therefore a necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system, so far as their jurisdiction is concurrent; and although they co-exist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that RES is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty. To attempt to seize it by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the Court from which it issues.

(and on page 183) . . . The principal which defines the boundaries of jurisdiction between the judicial tribunals of the States and of the United States, the application of which effectually prevents their confusion, was set forth and vindicated in the judgment of this court in *Ableman v.*

Booth, 21 How. 506. It was said by Chief Justice Teney, P 506, that "The sphere of action appropriate to the United States is as far beyond the reach of the judicial process issued by a State judge or a State Court as if the line of division was traced by landmarks and monuments visible to the eye." And speaking of the procedure in cases of HABEAS CORPUS, issued under State authority, and admitting the duty of the officer of the United States, holding the prisoner under its process, to return the fact and show his warrant, the Chief Justice continues, "But after the return is made and the State judge or Court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion of another government, and that neither the writ of HABEAS CORPUS nor any other process issued under State authority can pass over the line of division between the two sovereignities" . . .

. . . And the exclusive authority of the court issuing the writ extends, not only to the decision of all questions affecting its jurisdiction, and the form and force of the writ itself, and the validity of the proceeding in issuing and executing it, but also of all questions affecting the identity of the person or property seized and held under color of its authority and the right to exempt them from its operation.

In *McClellan v. Carlan* 217 US 268, last sentence:

. . . It cannot be denied that a Circuit Court of the United States, like other Courts, had power to postpone the trial of cases for good reasons, but by the orders made in this case the Federal Court withheld the further exercise of its authority until the state court, by its action involving all the parties, might render a judgment which would be

RES JUDICATA, and thus prevent further proceedings in Federal Court.

. . . In the present case, so far as the record before the Circuit Court of Appeals discloses, the circuit court of the United States had acquired jurisdiction, the issues were made up, and when the State intervened the Federal Court practically turned the case over for determination by the State Court. We think it had no authority to do this, and that the Circuit Court of Appeals upon the record before it, should have issued the writ of mandamus to require the judge of the Circuit Court of the United States to show cause why he did not proceed to hear and determine the case.

It follows that if the State Court does not have jurisdiction of the real property in a quiet title suit it can enter no lawful order whatsoever, and petitioner is immune to the State Court proceedings under the Constitution and laws of the United States.

CONCLUSION

Petitioner suggests that if the relief prayed for be not granted that any United States citizen may henceforth be denied the protection of his rights under the United States Constitution and Federal law, by the simple device of the defendants counter-suing in State Court.

For the foregoing reason, this petition for writ of certiorari should be granted.

Respectfully submitted,

Marvin J. Morse
Pro Se Petitioner

Appendix A

In the United States District Court
for the District of Kansas

No. T-3987

MARY CATHERINE SHEPARD, and MARGARET CHRISTENSEN, on behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

D. A. HINDMAN; CHARLEY LYND, et al.,
Defendants.

RULING ON SPECIAL ISSUE OF CLASS ACTION

Plaintiffs Shepard and Christensen, two of eight surviving children and heirs at law of George W. Atherton, now deceased, brought this action in this Court against defendants Hindman, Lynd and owners of leasehold and mineral interests in certain described real estate in Rooks County, Kansas.

The two plaintiffs are non-residents of Kansas and diversity of citizenship appears to exist between them and the named defendants. The problem here arises because plaintiffs allege in their complaint that the action is maintained as a Class Action on behalf of themselves and six of their sisters, all of whom, they allege, are remaindermen entitled to the real estate described in the complaint by virtue of the provisions of the Will of their grandfather, James E. Atherton, deceased.

It appears that three of the remaindermen are residents of Kansas and defendants contend that the effort to maintain this as a Class Action is for the purpose of circum-

venting the jurisdiction of the state court and to use such device as a subterfuge for obtaining federal jurisdiction in this court.

Initially the Court determines that less than all tenants in common in real estate, situated in Kansas, may maintain against third parties an action in ejectment, or forceable entry and detainer or to establish his or her undivided interest in the real estate. *Holt v. King,* 250 F.2d 671.

The defendants Hindman and Lynd and some of the owners of leasehold or mineral interests raise the special defense that

> "some of the persons alleged in the complaint to be members of the class plaintiffs claim to represent, are citizens of the State of Kansas. This action is not truly or properly a class action; the complainants are not too numerous and it is not impracticable for them to join as plaintiffs in an action against the defendants; nor can the present plaintiffs fairly insure adequate representation of the non-party complainants. This action is cast as a class action for the purpose of wrongfully and improperly conferring jurisdiction on the United States District Court."

The proposition must be considered under the applicable provisions of Rule 23 which was amended, effective July 1, 1966. The Court believes that the issue must be determined from a consideration of paragraph (a) of the rule which reads:

> "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

It appears from the record that there are only eight contingent remaindermen who could have claims against the real estate which is the subject of the action here. All are known, their places of abode are known. While it is asserted in the complaint that it is impracticable to bring them into court, there is no allegation of fact from which such a determination can be made, nor does the record establish such fact.

Rule 23 requires that one or more members of a class may sue as a representative party *only* if the class is so numerous that joinder of all the members is impracticable. While it may be conceded that there are questions of law or fact common to the class, and the claims of the representative parties are typical of the claims of the class, (though this is denied) and the representative parties could fairly and adequately protect the interests of the class, the plaintiffs do not allege, nor does it affirmatively appear, that "the class is so numerous" that joinder of all members is impractical. Plaintiffs contend that multiplicity of actions may be avoided by permitting the maintenance of this as a class action because other remaindermen would have to file separate actions in the place of residence of each, and that this would therefore be impractical. This contention cannot be sustained because the action to recover an interest in real estate, as here, is in the jurisdiction where the property is located. Actions in other jurisdictions would not be maintainable. See authorities cited and rule stated in 36 C.J.S. p. 133 Title Federal Courts, Section 25(1).

It is said that the size of the group sufficient to justify a class action is relative according to the situation as it exists and is a matter of judicial discretion. *Rank v. Krug*, 90 F.Supp. 773, 804.

The sufficiency of numbers in a class considered adequate to sustain a Class Action has been considered by this Court. In *Coffman v. City of Wichita,* 165 F.Supp. 765, opinion adopted by Tenth Circuit Court of Appeals, 261 F.2d 112, where it appeared that the owners of seven of eighteen tracts involved in the class joined on behalf of themselves and of the group, each of which were the owners of separate tracts of property to obtain a declaratory judgment as to the validity of certain eminent domain proceedings. The Court in its opinion said:

> "Assuming, without deciding, that there are common questions of law and fact, there is one requirement which all of the above types of classes must meet. That is, that the number involved in the class must be 'so numerous as to make it impracticable to bring them all before the Court. . .' Rule 23, F.R.C.P.28 U.S.C. There are eighteen tracts involved in this group, the owners of seven of which have joined individually. Under the facts of this case, it is concluded that this is not a spurious class action in which the parties are so numerous as to render it impracticable to have them before this Court."

The Court is aware that under the amended rule the categories of class actions have been eliminated but the application of the rule in respect to the requirement that the number involved in a class must be so numerous as to make it impracticable to bring them all before the Court has not been modified in any respect.

This rule announced is consistent with that in the case of *Jackman v. Union Pacific,* 4 F.R.D. 172, where it was said:

> "The plaintiff is able to name each of the seven other heirs of the decedent. There is no reason why

> these interested parties should not be brought into court and made parties plaintiff. The plaintiff is not confronted with an impracticable situation. It was not the design of the rule to permit class actions as the facts are presented here. Moreover, there is no averment or an assignment of a reason why all the heirs are not made parties plaintiff."

The special defense that the members of the class are not sufficiently numerous to support the maintenance of this action as a class action is well taken. The Court cannot under the circumstances say that the class is so numerous that the joinder of all the members is impracticable, particularly when plaintiffs may individually prosecute this action for the protection or recovery of their alleged interests or rights in the real estate involved.

Plaintiffs have requested that in the event this defense is sustained that they be permitted to amend their petition (complaint) so as to maintain this action for themselves individually. This request is granted and leave is given to so amend the complaint, labeled as a petition, within ten days.

It is so ordered.

Dated at Topeka, Kansas this 21st day of October, 1966.

/s/ GEORGE TEMPLAR

United States District Judge

Filed Oct. 21, 1966

In the United States District Court
for the District of Kansas

No. T-3987

MARY CATHERINE SHEPARD, and MARGARET CHRISTENSEN, on behalf of themselves and all others similarly situated,
Plaintiffs,

vs.

D. A. HINDMAN; CHARLEY LYND, et al.,
Defendants.

ORDER DENYING INJUNCTION TO STAY PROCEEDINGS

The plaintiff, Margaret Christensen, filed a motion in this Court on April 27, 1967 requesting the Court for an order pursuant to 28 U.S.C. 2283 enjoining any and all further proceedings in the cause captioned D. A. Hindman and Charley Lynd v. Mary Catherine Shepard, et al, No. 9,873 now pending in the District Court of Rooks County, Kansas until such time as this cause shall have been determined and concluded and the plaintiff's rights fully adjudicated. Plaintiff Christensen alleges in support of her motion that this action was filed and service obtained upon defendants herein prior to the filing by them of the action in the District Court of Rooks County, Kansas, which cause involves issues and subject matter in common with this cause.

Counsel for the interested parties have filed well prepared briefs supporting their respective contentions with respectable authorities cited.

The action pending here is brought to recover money damages against certain of the defendants and at the same

time to obtain a determination that certain conveyances and a quieting title judgment rendered by a state court be held void as a basis for the action to recover money damages, and it is further maintained for the purpose of enjoining defendants from extracting minerals from the premises described and to eject them from the same and for the further purpose of having plaintiff's title quieted to the property involved.

In a brief filed on their behalf, some defendants suggest a better solution to the problem of concurrent jurisdiction of the matters and issues involved between the parties here would be to stay proceedings in this Court. The Court is attracted by the suggestion but cannot sustain it.

After reviewing the file, the briefs and considering the arguments and statements of counsel, the Court is of the view that at most, this Court must exercise its discretion in ruling upon the motion to stay proceedings in state court, and though some duplication of effort may arise if the motion is denied, this Court should, taking into account the applicable law, the federal statutes controlling, and all of the facts and circumstances, at this time deny and overrule the motion.

It is so ordered.

Dated at Topeka, Kansas this 31st day of July, 1967.

/s/ GEORGE TEMPLAR

United States District Judge

Filed July 31, 1967

In the United States District Court
for the District of Kansas

Civil Action
No. T-3987

MARY CATHERINE SHEPARD, et al.,
Plaintiffs,

vs.

D. A. HINDMAN, et al.,
Defendants.

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This action is being maintained by Marvin J. Morse and others to determine and establish their interest in certain real estate located in Rooks County, Kansas, and described as:

> All that portion of Section 32 lying sough of the Union Pacific Railroad right-of-way in Township 9 south, Range 19 west of the 6th P.M., consisting of 333 acres, more or less.

This property was subject to a devise under the will of James E. Atherton, deceased, which was admitted to probate on August 4, 1925. By its terms, the will gave the property in question to George W. Atherton "to be held by him and for his use during his natural lifetime, provided he pay the taxes as they become due and payable on the same. . . . After the death of my son, the said George W. Atherton, it is my will and I hereby direct that the last above-described real estate shall descend to the children of his body and that the same be held by them and for their

use for a period of twenty years from the time of the death of the said George W. Atherton, after which the said children of my son George W. Atherton, shall come into full possession of the said described real estate and may hold the same or dispose thereof in any manner they wish."

Another provision of the will stated in substance that, "Should any one of my children (naming them) after coming into possession of the use of their respective lands, refuse to pay the taxes on the same . . . it is my will and I hereby direct (that he) . . . shall be deprived of any benefit whatever under this will and that the proceeds of the property which shall go to such offending person shall go to the other of my said children upon the payment of the taxes."

It appears that sometime after the death of James E. Atherton, his son George W. Atherton had taken possession of the real estate so devised to him, and that he had not been able to pay the taxes on the land. It further appears that he made a deal of some kind, the full details of which have not been completely established but which resulted in a deed being given to one Charley A. Lynd by George W. and Hattie Atherton, his wife, on February 11, 1944. The property was redeemed from tax foreclosure by Lynd and he thereafter instituted an action to quiet the title to the property so conveyed. Plaintiffs attack the effectiveness of this quiet title action, contending the judgment is completely void because certain indispensable parties were not joined in the action. After Judgment was rendered in this action (No. 7807) quieting title in Charley A. Lynd, on April 12, 1944, Charley A. Lynd conveyed to D. A. Hindman, a one-fourth interest in the oil and gas under the property and a three-eighths interest of the oil and gas to George and Hattie Atherton, his wife.

Thereafter, several events took place which are not of significance here, but about November 24, 1959, D. A. Hindman and wife, Charley A. Lynd and wife, and George W. Atherton and wife, executed oil and gas leases to one Albert A. Austin, the predecessor in title to holders or present leasehold interests in the property. Production of mineral was established and continues to be produced under these leases.

Several other interests have been created by conveyances from Lynd granting easements to pipeline companies, which companies are parties to this action.

Plaintiff, Marvin J. Morse, now presents to the Court his motion for summary judgment on the grounds that no genuine issue as to any material fact exists and that plaintiff is entitled to a judgment as a matter of law.

There are numerous defendants in this case, consisting of, among others, Charley A. Lynd, D. A. Hindman, the oil and gas lessees, mortgagees, holders of pipeline easements, and other parties claiming an interest by virtue of the oil and gas leases mentioned above.

Basically, various defendants contend:

(1) That the quiet title action in 1944 (Case No. 7807), maintained by Charley A. Lynd, barred plaintiffs from any interest in the property;

(2) That the statute of limitation bars plaintiffs' claims;

(3) That defendants are bona fide purchasers without notice of any claims, and that plaintiffs must be estopped to assert any interest in the property.

There are likely other issues to which the Court has not had its attention called, but plaintiffs' theory appears to be that a contingent remainder existed in them or their ancestor which has never been extinguished and which gives them an unfettered interest in the property which they now

endeavor to establish and from which they seek to exclude defendants. Other contentions seem possible, but generally speaking, this is the background of the case.

In considering motions for summary judgment, the Court must bear in mind the rules applicable. Where a party moves for summary judgment, he has the burden of establishing the lack of any material triable issue of fact by the record before the Court even though the opposing party would at trial have the burden of proof on the particular issue. Summary judgment is only appropriate where the case is so free from doubt as to render a formal trial useless. Inferences that may be drawn from all the facts before the Court should be viewed in a light favorable to the party opposing the motion. *Bolack v. Underwood,* 340 F.2d 816, (10 CA).

Furthermore, this Court was admonished in the case of Shehi v. Southwestern Bell Telephone Company, 382 F.2d 627, that summary judgment precludes an original finding of fact or the establishment of permissible inferences from undisputed facts and must flow only as a matter of law from undisputed facts. It is enough to say that the grant of summary judgment is improper where a case presents genuine issues as to material facts which the Court cannot say are free from doubt. *Morrow v. Spiess,* 349 F.2d 931, (10 CA); and see the case of *U.S.A. v. Cook,* T-3792, 4-13-66, unreported.

This Court cannot say from the disputed facts before it that the quieting title judgment is totally void; that the statute of limitation has run; that plaintiffs have remaindermen's interest in the property which they are entitled to preserve and eject defendants from any interests therein; nor can the Court say that as a matter of law defendant

oil and gas lessees were not purchasers for value, in good faith, without notice. These issues are not so free from doubt that the Court may say plaintiffs are entitled to judgment as a matter of law.

Plaintiff, in his motion for summary judgment, requests that if summary judgment is not rendered in his favor upon the whole case, or for all the relief asked, and a trial is necessary, that the Court, at the hearing on the motion by examining the pleadings and the evidence before it and by interrogating counsel, ascertain what material facts are actually, and in good faith, controverted, and thereupon make an order specifying the facts that appear without substantial controversy and directing further proceedings in the action as are just.

The Court must rule that plaintiff's motion for summary judgment should be denied. Plaintiff's suggestion that the Court define the issues that may remain and ascertain what material facts are in good faith controverted are matters that should be properly taken up before the Court under F.R.Civ.P., 16, which sets forth the pretrial procedure designed to accomplish the purpose suggested by plaintiff in his motion for summary judgment. At pretrial, these matters will be considered as the rule authorizes.

It Is, Therefore, Ordered, Adjudged and Decreed by the Court that plaintiff's motion for summary judgment filed on June 3, 1968, (Doc. 165), be, and the same is hereby, denied and overruled.

Dated at Topeka, Kansas, this 3rd day of July, 1968.

/s/ GEORGE QEMPLAN
United States District Judge

In the United States District Court
for the District of Kansas

Civil Action
No. T-3987

MARY CATHERINE SHEPARD, et al.,
Plaintiffs,

vs.

D. A. HINDMAN, et al.,
Defendants.

ORDER

On this 9th day of September, 1968, this matter came on for hearing before the Court,

First, upon the motion of plaintiff, Marvin J. Morse, to vacate the order of this Court entered March 8, 1968, refusing to enjoin the parties from proceeding in an action then pending before the Rooks County, Kansas District Court;

Second, upon the motion of defendants, D. A. Hindman and Charley A. Lynd, to stay proceedings in this Court pending the outcome of the action in the Rooks County, Kansas District Court.

Thereupon, the Court, after hearing arguments and statements of counsel and upon being fully advised in the premises, finds that plaintiff's motion to vacate and set aside the order of this Court entered March 8, 1968, should be denied.

It is so ordered.

Thereupon, the Court considered the motion of defendants, Hindman and Lynd, to stay further proceedings between the parties in this Court, and the Court, after fully considering the evidence submitted and the arguments and

statements of the parties and the counsel, finds that such motion should be taken under advisement, that defendants should be granted ten days to file a brief in support of their motion, and that plaintiff should be granted ten days' time thereafter within which to file reply briefs.

It is so ordered.

/s/ GEORGE TEMPLAR
United States District Judge

Filed September 25, 1968

In the United States District Court
for the District of Kansas

Civil Action
No. T-3987

MARY CATHERINE SHEPARD, et al.,
Plaintiffs,

vs.

D. A. HINDMAN, et al.,
Defendants.

ORDER GRANTING STAY

This action was first initiated in this Court when plaintiffs Mary Catherine Shepard and Margaret Christensen filed on March 3, 1966, a class action on behalf of themselves and other remaindermen under the provisions of the will of James E. Atherton, deceased, as a class. The action was brought to establish the rights of plaintiffs in described real estate in Rooks County, Kansas; to set aside deeds conveying interest in the property to defendants Hindman and George W. Atherton and Charley Lynd; declaring a quiet title judgment rendered in case number 7807 by Rooks County, Kansas District Court to be void; setting aside deed from Margaret Christensen to George W. Atherton; and praying money damages, actual and punitive, against defendants Lynd and Hindman; and also praying ejectment of oil and gas lessees and others claiming an interest in the property.

Defendants challenge the right of plaintiffs to maintain the suit as a class action and the Court on October 21, 1966, sustained defendants' special defense that members of the class were not sufficiently numerous to support the maintenance of a class action, but the Court, at that time, granted leave to plaintiffs to file an amended complaint

for themselves individually. On November 1, 1966, an amended complaint was filed by the same plaintiffs, as individuals, seeking substantially the same relief originally prayed for.

In the meantime, defendants Hindman and Lynd had instituted an action in the District Court of Rooks County, Kansas against Mary Catherine Shepard and other persons claiming an interest in the same real property. The determination of the rights and interests of the respective parties in that real estate is the basis of plaintiffs' suit in this Court. On plaintiffs' application, numerous holders of mineral interests in the land were made defendants in this Court and demands for an accounting were sought from each of such defendants, together with a prayer that they be excluded from any interest in the property about which the litigation is involved.

This Court has denied applications of plaintiffs to enjoin defendants from proceeding with the quiet title action in the Rooks County State Court. During the pendency of this action, plaintiff Mary Catherine Shepard died, and the action has been revived in the names of her successors in interest.

The case was placed on the September 9, 1968 Pre-Trial Calendar of the Court, and prior to that time, plaintiffs on September 3, 1968, filed a motion again seeking to enjoin defendants Hindman and Lynd from proceeding in the state court with the action they had instituted there and requesting this Court to vacate the order it had entered denying an injunction to enjoin parties from proceeding with the action in the state court. This motion the Court denied.

On September 4, 1968, defendants filed a motion to stay proceedings in this Court and offered in support of the motion a certified copy of a judgment supported by duly

certified copies of Findings of Fact and Conclusions of Law entered by the District Court of Rooks County, Kansas on September 3, 1968, purporting to quiet the title of the defendants here against the plaintiffs to the described real estate, the subject of the litigation before this Court.

The Court heard this motion on September 9, 1968, and received in evidence certified copies of the Findings and Conclusions and the Judgment entered September 3, 1968 by the Rooks County State Court.

It appears from the evidence submitted that the state court did render a judgment as claimed by Hindman and Lynd quieting their title to the land against plaintiffs here and that the judgment is final. The adjudication of the state court of the issue of ownership in the real estate here involved is determinative of the rights of all the parties to that property. It was said in the case of *Mandeville v. Cantebury*, 318 U.S. 47, 49:

> "But where the judgment sought is strictly in personam for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation at least until judgment is obtained in one court, which may be set up as res judicata in the other."

Again, in *Ballantine Books, Inc. v. Capital Distributing Co.*, 302 F.2d 17 (2nd Cir.), that court set forth the applicable rules as follows, p. 19:

> "The well established rule is that a federal court is not required to abate the normal in personam action on a plea of a pending action in a state court. . . . Had this case been initiated as a civil action rather than by arbitration, it would have been a simple contract action, with none of the in rem characteristics which required the application of a different rule in such

> cases. . . . In such cases, it is within the discretionary power of the district court to stay its proceedings pending the completion of state proceedings."

And, in *Princess Lida v. Thompson,* 305 U.S. 456, the following principle was stated:

> "Where the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other."
>
> "But if the two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought, the jurisdiction of the one court must yield to that of the other."

This principle was sustained in the Tenth Circuit by the case of *Brinkley v. Hassig, et al.,* 83 F.2d 351.

There is another aspect of the case to which reference should be made. A judgment rendered by a state court of competent jurisdiction is entitled to full faith and credit in all federal courts and bars an action in a federal court on the same cause between the same parties. A state court judgment, operating as a merger and extinguishment of the original claim or demand, will bar an action in a federal court on the same cause of action between the same parties or their privies. If the causes of action are substantially the same, a difference in the relief sought will not prevent the judgment in the state court from operating as an estoppel in the federal court. The judgment of the state court will be conclusive as to all points and questions actually put in issue and decided in the action in the state court. See 50 C.J.S., *Judgments,* § 900, and at § 899 of the same treatise, we find the general statement of applicable law that the principle of res judicata is applied as between

federal and state courts; and where suits on the same cause of action are pending simultaneously in a state court and in a federal court, a final judgment entered in either court will be binding and conclusive in the other, regardless of which suit was first commenced.

Presumably the judgment rendered by the Rooks County District Court, excluding plaintiffs here from any interest in the property involved, is a valid and enforceable judgment. If it is not vacated or reversed, the causes of action in the federal and state courts being substantially the same, the judgment will be conclusive on all points and questions actually put in issue and decided in the action in the state court as between the parties and their privies. See cases cited in 50 C.J.S., *Judgments,* § 900, p. 522.

One of the plaintiffs, Marvin J. Morse, has announced to this Court that a new trial is being sought from the judgment rendered against him and the other plaintiffs by the Rooks County State Court, and if the motion is overruled, that an appeal will be taken by them to the Kansas Supreme Court. Under such circumstances, it is the view of this Court that a stay of further proceedings should be granted as requested by defendants Hindman and Lynd until the motion for a new trial in the Rooks County State Court is determined, and if denied, until the contemplated appeal is heard and determined by the Kansas Supreme Court in that case. Thereafter, the Court will consider any further proceeding required by the facts and circumstances as they then appear.

It is by the Court so ordered.

Dated at Topeka, Kansas, this 11th day of October, 1968.

/s/ GEORGE TEMPLAR

United States District Judge

Filed Oct. 11, 1968

Appendix

In the United States District Court for the District of Kansas

No. T-3987

MARY CATHERINE SHEPARD, et al.,
Plaintiffs,

vs.

D. A. HINDMAN, CHARLEY A. LYND, et al.,
Defendants.

ORDER EXTENDING TIME WITHIN WHICH TO DOCKET RECORD ON APPEAL

Now, on this 25th day of November, 1968, for good cause shown, it is by the Court

Ordered that the time in which record on appeal in above cause may be docketed in the United States Court of Appeals, Tenth Circuit, be and the same is hereby extended until and including January 22, 1969.

/s/ GEORGE TEMPLAR
Judge

Filed Nov. 25, 1968

Appendix B

In the District Court of Rooks County, Kansas

No. 9873

CHARLEY A. LYND and D. A. HINDMAN,
Plaintiffs,

vs.

MARY CATHERINE SHEPARD, et al.,
Defendant.

OPINION

At the pretrial conference in this matter some of the defendants made a request for a jury. To this request the plaintiffs and one defendant objected.

The suit was filed as a quiet title action by plaintiffs. Defendants now seek to quiet title in themselves and seek damages for having been deprived of possession.

No claim could be made for the right of trial by jury except on the damages.

Able briefs have been furnished to the Court by plaintiffs and Mr. Frank Sabatini for some of the defendants.

The Court finds that this case is not a jury matter. The defendants, by filing a cross petition, asking for a money judgment, did not change the nature of plaintiffs' cause of action.

Dated this 8th day of April, 1968.

/s/ C. E. BINLY
District Judge

Filed Apr. 8 1968

In the District Court of Rooks County, Kansas

Case No. 9873

D. A. HINDMAN and CHARLEY A. LYND,
Plaintiffs,

vs.

MARY CATHERINE SHEPARD, BARBARA HILLMAN, FRANCES GFELLER, MARGARET CHRISTENSEN, ANNA ALLEY, LAURA MERRITT, ELIDA MERRITT and BERNADINE SCOTT,
Defendants.

JUDGMENT

Judgment is hereby entered in accordance with the Court's Memorandum Opinion, Findings of Fact and Conclusions of Law made and entered in this action and filed by the Clerk of the Court under date of August 5, 1968. In accordance therewith:

General judgment is entered in favor of the plaintiffs and against the defendants and each of them.

The cross-petitions and complaints of each of the defendants are denied.

The title of the plaintiff Charley A. Lynd to the ownership of the entire surface estate and an undivided 3/8ths interest in the minerals and mineral estate in the following described land:

> All that portion of Section Thirty-two (32), Township Nine (9), Range Nineteen (19), Rooks County, Kansas, lying south of the Union Pacific Railroad right-of-way,

is hereby quieted against the claims of the defendants and each of them, their heirs, successors and assigns, or any parties claiming under them.

The title of the plaintiff D. A. Hindman to the ownership of an undivided ¼th interest in the minerals and mineral estate in and under the above described land is also quieted against the claims of the defendants and each of them, their heirs, successors and assigns, or any parties claiming under them.

The defendants and each of them are hereby restrained and enjoined from claiming, asserting or setting up any right, title, interest or estate in and to the real estate hereinabove described which is inconsistent with the terms of this judgment and the right, title and estate hereby quieted in the plaintiffs Lynd and Hindman, respectively, provided that the defendants Barbara Hiliman, Frances Gfeller, Margaret Christensen, Anna Alley, Laura Merritt, Elida Merritt, Bernadine Scott and Catherine Marie Ransom, Harold Alfred Morse, Ralph Leland Morse, Donald Edward Morse, Marvin James Morse, Mrs. Esther Rhaecilla Hanzen and Mrs. Shirley Yvonne Henderson are recognized to be the owners collectively of an undivided ⅜ths mineral interest for a period of twenty (20) years commencing April 12, 1944, and as long thereafter as oil and/or gas is produced from these premises or the property is being developed or operated.

The costs of this action are taxed to the defendants.

It is so ordered.

The Findings of Fact and Conclusions of Law of the Court are hereby made a part of this Journal Entry.

C. E. Birney
Judge

Filed Sept. 3rd, 1968
Irma Renner
Clerk

In the District Court of Rooks County, Kansas

No. 9873

D. A. HINDMAN and CHARLEY A. LYND,
Plaintiffs,

vs.

MARY CATHERINE SHEPARD, et al.,
Defendants.

JOURNAL ENTRY

Now to-wit on this 3rd day of September, 1968, the same being the first day of the regular September, 1968 term of said Court, and court being in due and legal session, plaintiffs appearing by Stanley Krysl of Stockton, Kansas, one of their attorneys of record, and plaintiff, D. A. Hindman also appearing in person, and no other parties appearing, matters pending herein before the Court, came regular on for hearing.

Thereupon the motion of defendant, Marvin J. Morse, to amend the Court's Memorandum Opinion and Findings of Fact, was considered by the Court.

Thereupon the Court announced that it had studied this motion in advance of this hearing.

Thereupon the Court finds and decrees that said motion should be, and the same is overruled.

Thereupon, the Journal Entry of Judgment, prepared by counsel for plaintiffs, was submitted to the court, together with evidence in the form of letters advising that Frank Sabatini, attorney for some of the defendants, had declined to approve said Journal Entry because the Court's Findings of Fact and Conclusions of Law were not included, and that a copy of said Journal Entry had been mailed to Marvin J. Morse, under date of August 12, 1968, by plaintiffs'

counsel with letter advising that if he had any objections to the form thereof to file said objections within ten (10) days from said date.

Thereupon said Journal Entry was considered by the Court.

Thereupon the Court finds and decrees that no objections had been filed by Marvin J. Morse and that said Journal Entry should be approved by the court, subject that the following be added at the end thereof, viz: "The Findings of Fact and Conclusions of Law of the Court are hereby made a part of this Journal Entry."

Filed Sept. 5, 1968

Thereupon the aforesaid language was added to said Journal Entry and the same was approved by the Court and signed by the Judge thereof, and filed with the Clerk.

Judge

In the District Court of Rooks County, Kansas

No. 9873

D. A. HINDMAN and CHARLEY A. LYND,
Plaintiffs,

vs.

MARY CATHERINE SHEPARD, et al.,
Defendants.

JOURNAL ENTRY
(Overruling Motion for New Trial)

Now to-wit on this 4th day of October, 1968, the same being an adjourned day of the regular September, 1968 term of said court, and one of the regular designated motion and court days thereof, the motion of Marvin J. Morse for a new trial came regular on for hearing; plaintiffs appearing by their attorney, Stanley Krysl of Stockton, Kansas, and plaintiff, D. A. Hindman, also appearing in person, and no other parties appearing.

Thereupon, said motion was presented to the Court by the attorney for plaintiffs.

Thereupon, the Court announced that it had studied said motion in advance and was prepared to rule thereon.

Thereupon the Court finds that said motion should be overruled.

It is therefore by the Court considered and ordered that said motion be, and the same is overruled.

Judge

O.K. Stanley Krysl,
Attorney for Plaintiffs
Filed Oct. 14 1968

[Title of Court and Cause omitted]

ORDER FOR ALLOWING EXTENSION OF TIME IN WHICH TO PREPARE TRANSCRIPT

Now on this 6th day of December, 1968, the Court orders that the time in which the Official Reporter of this Court shall prepare and complete that transcript requested by counsel for certain of the appellants on or about the 7th day of October, 1968, be extended for thirty (30) days from December 8, 1968, to and including January 7, 1969.

It Is So Ordered.

/s/ C. E. Birney
C. E. Birney, District Judge

In the District Court of Rooks County, Kansas

No. 9873

D. A. HINDMAN and CHARLEY A. LYND,
Plaintiffs,

vs.

MARY CATHERINE SHEPARD, et al.,
Defendants.

JOURNAL ENTRY

Now to-wit on this 13th day of January, 1969, the same being an adjourned day of the regular January, 1969 term of said court, and one of the regular designated motion days thereof, plaintiffs appearing by one of their attorneys of record, Stanley Krysl of Stockton, Kansas, plaintiff, D. A. Hindman appearing in person, and defendant, Marvin Morse, also known as Marvin James Morse and Marvin J. Morse, appearing in person and representing himself, and no other parties appearing, the above entitled matter came regularly on for further proceedings.

Thereupon, Defendant Marvin James Morse presented his motions to vacate and set aside all orders, findings, conclusions and judgments and motion to dismiss for lack of jurisdiction.

Thereupon, said motions were orally argued by the parties present and the court being fully advised in the premises, and after due consideration, finds that said motions to vacate and set aside all orders, findings, conclusions and judgments and motion to dismiss for lack of jurisdiction should be overruled.

It is so ordered by the Court.

s/C. E. BIRNEY
C. E. Birney
Judge

Approved s/ Stanley Krysl,
Stanley Krysl
Stockton, Kansas
Attorneys for Plaintiff.

s/ Marvin J. Morse
980 Barkley Ct.
Pinole, California
Pro-Se Defendant

In the Supreme Court of the State of Kansas

No. 45,622

D. A. HINDMAN AND CHARLEY A. LYND,
Appellees,

vs.

MARY CATHERINE SHEPARD, et al.,
Appellants.

You are hereby notified of the following action taken in the above entitled case:

Motion by Appellant to dismiss for lack of jurisdiction.
Motion by Appellant to dismiss appeal, DENIED.

Yours very truly,

JAMES R. JAMES
Clerk, Supreme Court

Date January 29, 1969

Appendix C

September Term, November 12, 1968.

Before Honorable Jean S. Breitenstein, Honorable Oliver Seth and Honorable John J. Hickey, Circuit Judges.

Marvin J. Morse, *Petitioner,* vs. The District Court of Rooks County, Kansas; The Honorable C. E. Birney, Judge of the Thirty-Fourth Judicial District of Kansas and presiding judge of The District Court of Rooks County Kansas; D. A. Hindman and wife Pauline; Charley A. Lynd and wife Elida; Margaret Christensen; Bernadine Scott; Anna Alley; Barbara Hillman; Elida Merritt; Laura Merritt; Francis Gfeller; Harold A. Morse; Ralph L. Morse; Donald E. Morse; E. Rhaecilla Hanzen; Catherine M. Ransom; Shirley Y. Henderson, Attorneys Tom Triplett and Robert Martin; Stanley Krysl; Frank Sabatini; Joel Sterrett and Lawrence Munns, *Respondents.*	No. 157-68

By his application for a writ of prohibition and, in the alternative, an injunction, the petitioner seeks to stay proceedings in a Kansas state court. A suit was brought in the federal court apparently involving some of the parties to the state suit and some, or all, of the issues. The federal court refused to stay the state court proceedings and denied a motion for summary judgment.

Section 2283, 28 U.S.C., says that a federal court may stay state court proceedings when necessary in aid of its

jurisdiction or to protect its judgments. Here the federal district court has determined that the injunction is not needed in aid of its jurisdiction. We find nothing in the papers to show that in so acting the district court abused its discretion. That court has entered no judgment which must be protected.

The application for a writ of prohibition and for an injunction are severally denied.

A true copy

Teste

William L. Whittaker
Clerk, U.S. Court of
Appeals, Tenth Circuit

[Seal]

/s/ Helen R. Bartha
Deputy Clerk

Appendix D

DEED SPECIAL WARRANTY

THIS INDENTURE, Made this 11th day of February, A.D. 1944 between George W. Atherton and Hattie Atherton, his wife, of Wallace County, in the State of Kansas of the first part, and Charley A. Lynd of Trego County, in the State of Kansas of the second part:

WITNESSETH, That said parties of the first part, in consideration of the sum of ($1.00) One and No/100 DOLLARS, and other consideration to them in hand paid by said party of the second part, before the delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained and sold, and by these presents do grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns forever, all of the following-described real estate, lying and situate in the County of Brooks, and State of Kansas, to wit:

> All that part of Section Thirty-two (32), lying South of the Union Pacific Railroad Right-of-way in Township Nine (9) South, Range Nineteen (19), West, consisting of 333 acres, more or less

$3.00
(Revenue Stamps attached)

TO HAVE AND TO HOLD THE SAME, Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, unto the said party of the second part, his heirs and assigns forever: And the said Parties of the First Part for themselves, their heirs, executors and administrators, do hereby covenant, promise and agree, to and with the said party of the second part, that at the delivery of these

presents they are lawfully seized of said interest of and in all and singular the above-granted and described premises, with the appurtenances, and said interest in and to the same, unto the said party of the second part, his heirs and assigns, against the said parties of the first part, and their heirs, and against all and every person and persons whomsoever, lawfully claiming or to claim the same and shall and will warrant, and by these presents, forever defend.

IN WITNESS WHEREOF, The said parties of the first part have hereunto set their hands the day and year first above written

George W. Atherton
Hattie Atherton

.....

.....

WITNESS:

D A Hindman
Notary Public
Term expires 4/26/47

Filed Feb 11, 1944 and recorded in Book 52 Page 270
Mable L. Stewart, Register of Deeds.

CONTRACT

This Agreement Is Made By and Between George W. Atherton and Hattie A. Atherton, his wife and Charley A. Lynd and Elida Lynd, his wife, the first named being hereinafter referred to as first parties and the second named being hereinafter refered to as second parties.

Witnesseth; Whereas, First Parties have executed and delivered to Charley A. Lynd a deed covering the following described property located in Rooks County, Kansas, to-wit:

All that part of Section Thirty-Two (32), lying South of the Union Pacific Railroad Right-of-way in Town-

ship Nine (9) South, Range Nineteen (19), West, consisting of 333 acres, more or less,

and

Whereas, a suit is now pending in the District Court or Rooks County, Kansas, to clear the title to said property.

Now Therefore, as a part of the consideration for said deed second parties agree, in the event said title is cleared in said action, to convey to first parties an undivided 3/8ths interest of the oil, gas and mineral rights in and to the above described property for a period of Twenty-(20) years, and as long thereafter as oil and/or gas is produced from said premises.

The above described Royalty or Mineral conveyance shall be delivered to first parties immediately after the completion of said suit, and shall provide that said interest shall be conveyed to First Parties and the survivor thereof.

In the event said property is not cleared in said action second parties are to reconvey said property to First parties and they are to re-pay the said Charley A. Lynd all money that he has advanced or paid in connection with said property, and in addition thereto first parties are to divide any Oil or Gas that they receeive from said property if it is possible for them to do so, with said Charley A. Lynd.

In Witness Whereof, said parties have hereunto subscribed their names this 7th day of April 1944.

/s/ George W. Atherton

/s/ Hattie A. Lynd Atherton

First Parties

/s/ Charley A. Lynd

/s/ Elida Lynd

Second Parties

E COURT, U. S.

No. 1081

FILED
FEB 24 1969
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968

MARVIN J. MORSE,
Petitioner,

vs.

D. A. HINDMAN and CHARLEY A. LYND
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

Petition

MARVIN JAMES MORSE
980 Barkley Ct.
Pinole, California
Pro-se Petitioner

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

MARVIN J. MORSE,
Petitioner,

vs.

D. A. HINDMAN and CHARLEY A. LYND
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

Petition

The pro se petitioner, Marvin J. Morse, prayes the Supreme Court grant a writ of Certiorari to review:[1]

The order of the Kansas Supreme Court entered on 29 January, 1969 in *Hindman v. Shepard,* denying petitioner's Motion to Dismiss for Lack of Jurisdiction.

CITATIONS TO OPINIONS

The order of the Kansas Supreme Court in *Hindman v. Shepard* is unreported but is set out in the Appendix at

1. The additional appellant-defendants are Barbara Hillman; Francis Gfeller; Margaret Christensen; Anna Alley; Laura Merritt; Elida Merritt; Bernadine Scott; and Rhaecilla Hanzen.

page 29 of the petition for Certiorari No. 1031 this Term, which petitioner adopts as part of this petition.

JURISDICTION

The Orders in the cases sought to be reviewed herein are as follows:

On September 3, 1968, the Rooks County District Court entered judgment against petitioner; (App. p. 23) on October 14, 1968, motion for new trial was denied; (App. p. 26) on November 13, 1968 petitioner filed Notice of Appeal; on December 6, 1968 (App. p. 27) the Court granted the Court Reporter additional time, to January 7, 1969, to prepare a transcript; on January 13, 1969 the Court denied petitioner's motion to dismiss for lack of jurisdiction; and on January 17, 1969 petitioner docketed the appeal, from the orders denying the motion to dismiss, in the Kansas Supreme Court, supported by certified copies of a "Record for Intermediate Hearing." (Records p. 1,023).

On January 29, 1969, the Kansas Supreme Court entered an order denying the motion without arguments, (App. p. 29b) this order denying a motion to dismiss is sufficient evidence that the highest Court in the State of Kansas intends to exercise *in REM* jurisdiction over the disputed property. The jurisdiction of this Court to review by writ of certiorari the order of the state Court's order denying a motion to dismiss is conferred by Title 28 U.S.C. 1257(3). *United States vs. Munsingwear* 340 U.S. 36, 40.

QUESTIONS PRESENTED

Petitioner adopts the Questions Presented in the petition in No. 1031 at page 4.

STATUTES INVOLVED

Petitioner adopts the list of Statutes Involved as set out in the petition in No. 1031 at page 6, and in addition K.S.A.

60-215(c) and Federal Rule 15(c) *Relation Back of Amendments*. Whenever the claim or defense asserted in the amended pleading arose out the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading. . . . .

STATEMENT OF THE CASE

Petitioner adopts the Statement of the Case set out in the petition in No. 1031 at page 10.

REASONS FOR GRANTING THE WRIT

Petitioner adopts the Reasons for Granting the Writ set out in the petition in No. 1031 at page 19.

CONCLUSION

Petitioner suggests that if the relief prayed for be not granted that any United States citizen may henceforth be denied the protection of his rights under the United States Constitution and Federal law, by the simple device of the defendants countersuing in State Court.

For the foregoing reason, this petition for writ of certiorari should be granted.

Respectfully submitted,

MARVIN J. MORSE,
Pro Se Petitioner

SUPREME COURT, U. S. IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1031

Office-Supreme Court, U.S.
FILED
MAR 10 1969
JOHN F. DAVIS, CLERK

MARVIN J. MORSE,
Petitioner,

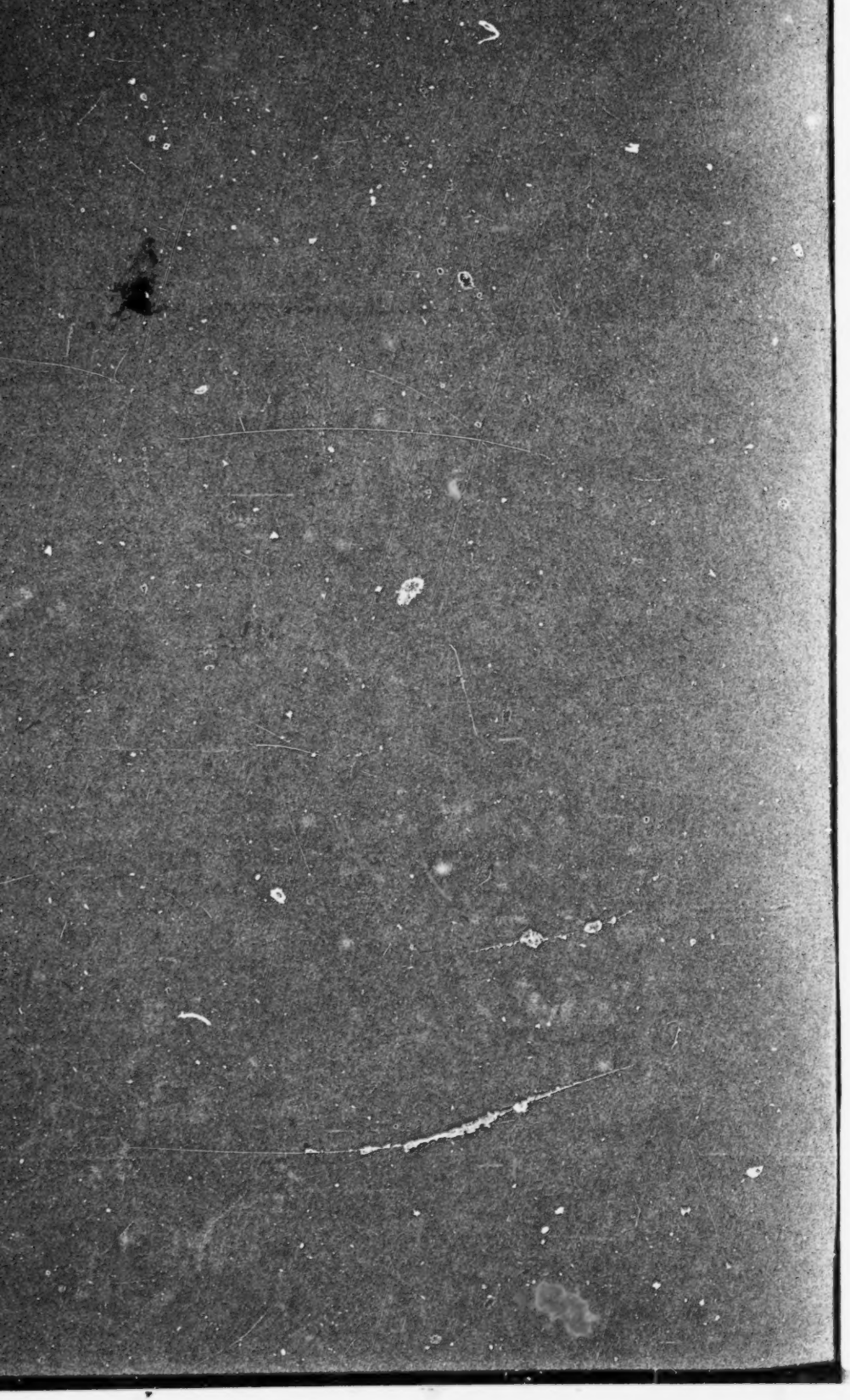
vs.

D. A. HINDMAN, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF FOR RESPONDENTS TOMLINSON-KATHOL, INC.; WILLIAM T. KEMPER; RAY H. QUACKENBUSH; EUGENE CRABTREE; FRANK E. HEDRICK; THEODORE CARTER; JIM DONHAM; E. DAVIS HICKMAN; JESSIE I. WILCOXON; THE FOURTH NATIONAL BANK AND TRUST COMPANY, WICHITA; WARREN TOMLINSON, GERALD J. KATHOL; OREAD OIL COMPANY; CHARLES AIKENS; JOE HICKMAN; JAMES W. OWENS, RUSSELL COBB, JR.; BARTON OIL COMPANY AND LYDIA E. KEARNS IN OPPOSITION

GEORGE B. POWERS
MALCOLM MILLER
BENJAMIN C. LANGEL
600 Fourth National Bank Building
Wichita, Kansas 67202
Counsel for Respondents Tomlinson-Kathol, Inc.; William T. Kemper; Ray H. Quackenbush; Eugene Crabtree; Frank E. Hedrick; Theodore Carter; Jim Donham; E. Davis Hickman; Jessie I. Wolcoxon; The Fourth National Bank and Trust Company, Wichita; Warren Tomlinson, Gerald J. Kathol; Oread Oil Company; Charles Aikens; Joe Hickman; James W. Owens; Russell Cobb, Jr.; Barton Oil



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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1031

MARVIN J. MORSE,
Petitioner,

vs.

D. A. HINDMAN, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF FOR RESPONDENTS TOMLINSON-KATHOL, INC.; WILLIAM T. KEMPER; RAY H. QUACKENBUSH; EUGENE CRABTREE; FRANK E. HEDRICK; THEODORE CARTER; JIM DONHAM; E. DAVIS HICKMAN; JESSIE I. WILCOXON; THE FOURTH NATIONAL BANK AND TRUST COMPANY, WICHITA; WARREN TOMLINSON, GERALD J. KATHOL; OREAD OIL COMPANY; CHARLES AIKENS; JOE HICKMAN; JAMES W. OWENS, RUSSELL COBB, JR.; BARTON OIL COMPANY AND LYDIA E. KEARNS IN OPPOSITION

OPINIONS BELOW

The various opinions below are set forth in the Appendix to the Petition on pages 21 through 29.

JURISDICTION

Jurisdictional requisites are set forth in the Petition.

QUESTIONS PRESENTED

1. Whether this Court should grant a writ of certiorari to review the stay order and order denying summary judgment entered by the United States District Court for the District of Kansas when both orders are the subject of pending appeals by petitioner to the United States Court of Appeals for the Tenth Circuit.

2. Whether this Court should grant a writ of certiorari to review the actions of the Kansas courts when an undecided appeal taken by petitioner raising substantially the same issues is now pending in the Supreme Court of the State of Kansas.

3. Whether this Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit refusing to issue a writ of prohibition or an injunction to stay the state court proceedings.

4. Whether the Kansas courts or the federal courts have jurisdiction over the real property involved where the state court action was brought between the time when the federal district court entered an order sustaining a motion to dismiss a class action as improperly brought and the date an amended complaint was filed in the federal district court in the name of individual plaintiffs pursuant to leave of the federal district court judge.

5. Whether under Kansas law the failure to join a deceased minor and two children of living defendants who had no record title makes any judgment rendered in a quiet title action void.

STATEMENT OF THE CASE

The original action that commenced this series of litigation was a "petition" filed in the United States District Court for the District of Kansas (R. 7) on March 3, 1966. As stated by petitioner herein on page 17 of the Petition*, the plaintiffs claimed that a judgment taken against them and their predecessors in interest to a tract of real property located in Rooks County, Kansas, was void because of failure to join indispensable parties defendant and because of fraud in procuring the judgment.

These respondents (who are the oil and gas lessee and its grantees), together with the owners of most of the mineral interest in the property, were joined as defendants. Plaintiffs sought to recover possession of the property, damages and an accounting.

Such action was originally filed as a class action by two sisters on behalf of a class purporting to consist of eight sisters. Defendants moved to dismiss the purported class action on the basis that the filing of a class action on behalf of so small a "class" was impermissible and was merely a device to circumvent the diversity requirements for federal court actions inasmuch as other sisters were Kansas residents.

On October 21, 1966, the Honorable George Templar entered his "Ruling on Special Issue of Class Action". (P. Appendix A; R. 41.) In this ruling, which respondents contend amounted to a dismissal of the action, Judge Templar found that the action was not a proper class action and then granted the individual plaintiffs ten days to file an amended complaint in their own behalf.

---

*Reference to the Petition in this Brief will be denoted by "P. . . ." and reference to the Record will be denoted by "R. . . ."

On October 28, 1966, defendants Hindman and Lynd (the mineral owners from whom these respondents obtained their interests in the property in question) instituted an action in the District Court of Rooks County, Kansas, against all of the present claimants to the property. (R. 1,047.) These respondents are not a party to that action.

Thereafter, on November 1, 1966, an amended complaint was filed in the United States District Court for the District of Kansas by Mary Catherine Shepard, mother of petitioner herein, and by Margaret Christensen.

In conjunction with numerous motions in both courts in which petitioner and the other claimants to the property sought to have the state court action dismissed or stayed, the defendants filed answers in the state court action (R. 1,055, 1,058) in which they asserted by way of counterclaim substantially all of their claims to the property that they make in the federal court action.

The state court action was then tried to the court sitting without a jury, and on September 3, 1968, the Honorable C. E. Birney, entered judgment* against petitioner and the other claimant-defendants and quieted title (except for an undisputed 3/8 mineral interest) in favor of plaintiffs Hindman and Lynd against the claims of defendants Morse and the other claimants. After a motion for new trial was overruled on October 14, 1968 (R. 1,097), petitioner filed a notice of appeal to the Supreme Court of the State of Kansas. (R. 1,098.) Other defendants in that action had previously filed notices of appeal. (R. 1,090, 1,091, 1,094 and 1,095.)

*Judge Birney's Opinion and Findings of Fact and Conclusions of Law are set forth in full in the Appendix attached hereto. The Findings of Fact contained therein contain a good resume of the operative facts upon which this action was based.

The day after the judgment in the state court action was entered, defendants Hindman and Lynd filed a motion in the federal court action to stay all further proceedings in the federal court action pending the state court judgment becoming final by appeal or otherwise. The motion to stay, in which these respondents joined, was granted by Judge Templar on October 11, 1968. (P. 15; R. 237.) Petitioner filed a notice of appeal from the stay order and from several prior orders on October 25, 1968. (R. 242.) Motions to dismiss the attempted appeal have been filed but not decided.

Thereafter, on November 12, 1968, the United States Court of Appeals for the Tenth Circuit refused an original application of petitioner for a writ of prohibition or an injunction staying the proceedings in the Kansas courts. (P. 30.)

To briefly summarize the proceedings below, the state court action has been tried and is now on appeal. The Kansas Supreme Court refused to grant petitioner's highly unusual motion to dismiss the action without hearing (P. 29), so his appeal is still pending in that court. The federal court action has been stayed pending the outcome of the state court appeal, and petitioner herein has appealed that stay order. Undecided motions to dismiss that appeal are on file with the United States Court of Appeals for the Tenth Circuit. The Court of Appeals refused to short-cut the appeal process by granting a writ of prohibition or an injunction against the state court proceeding. There is, therefore, an undecided appeal now pending before both the Supreme Court of the State of Kansas and the Court of Appeals for the Tenth Circuit. Both the federal court and the state court actions involve the same issues relating to the ownership of the property in question.

REASONS FOR DENYING THE WRIT

1. There are pending appeals before the United States Court of Appeals for the Tenth Circuit and the Supreme Court of the State of Kansas in which all of the issues presented in this litigation may be determined.

2. This action is absolutely unique on its facts, involves no conflict in decisions by the various Circuit Courts of Appeals and presents no question of public importance.

3. Petitioner is not entitled to any relief on the merits.

ARGUMENT

I.

All of the Issues Presented by the Petitioner Are Either Before the United States Court of Appeals or the Supreme Court of the State of Kansas or May Yet Be Presented to Such Courts.

Although petitioner states in his petition that he ". . . has exhausted both Federal and State Court remedies . . ." (P. 19), the fact of the matter is otherwise. There has been no final judgment rendered by any appellate court on the merits of petitioner's lawsuit. His own appeal to the Supreme Court of the State of Kansas is still pending and that tribunal has not been afforded any opportunity to consider any of the substantive law questions relating to the validity of the 1944 quiet title judgment or any of the issues underlying petitioner's claim for relief. The order of the Supreme Court of the State of Kansas of which petitioner complains did not dispose of the case, but merely left the case for full argument on the merits.

Similarly, the United States District Court for the District of Kansas has rendered no final judgment. Judge

Templar has only stayed his action pending the outcome of the state court action. The Court of Appeals for the Tenth Circuit has not yet been afforded an opportunity to review that stay order.

Even if the motions to dismiss the appeal from the stay order and other preliminary orders is granted, however, this proceeding in this Court would still be premature. Judge Templar's order, being only interlocutory in nature, does not in any manner purport to dispose of the case, and after a final judgment is rendered by the district court, petitioner can then take an appropriate appeal if he is dissatisfied with the result.

Thus, all of the issues involved in this litigation are still pending in both judicial systems and rather than petitioner having exhausted his remedies in both judicial systems, he has not prosecuted his case completely through either judicial system. The petition is, therefore, premature and ". . . it is not yet ripe for review by this Court." *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor and Aroostook Railroad Company*, 389 U.S. 327, 328, 88 S.Ct. 437, 19 L.Ed.2d 560, 561 (1967).

II.

The Case at Bar Involves a Unique Factual Situation of Concern Only to the Individual Litigants and Is of No Public Importance.

As is obvious from a review of the factual statement contained in both the Petition and in this Brief in Opposition, the basic litigation herein is concerned only with title to a particular tract of real property located in Rooks County, Kansas, and with the validity of a particular quiet title action that is now approximately twenty-five years old. The questions presented in this litigation are of considerable economic importance to the parties, and the

legal questions presented by reason of the tortured course of the various companion pieces of the litigation are somewhat complex, but neither of these is sufficient to warrant this Court granting the Petition. Rule 20 of this Court states that:

> "A writ of certiorari to review a case pending in a court of appeals before judgment is given in such court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court."

Clearly, there is nothing of "imperative public importance" in the case at bar such as this Court had before it in *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153, 26 A.L.R.2d 1378 (1952) where the President of the United States had ordered the seizure of the steel plants and facilities of the nation's steel companies and in *United States* v. *United Mine Workers of America,* 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1947) where a federal district court had issued restraining orders preserving labor conditions at coal mines seized by the federal government during the time of war.

Similarly, a writ of certiorari should not be granted to review the state court proceedings as no federal question of substance has been decided at all in that system as required by Rule 19 of this Court. As stated by the late Mr. Justice Frankfurter in *Rice* v. *Sioux City Memorial Park Cemetery,* 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955):

> "A federal question raised by a petitioner may be 'of substance' in the sense that, abstractly considered, it may present an intellectually interesting and solid problem. But this Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. (citations

omitted.) 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic. * * *"

(349 U.S. at 74, 99 L.Ed. at 901.)

The only question that has been decided by the Supreme Court of Kansas is that it will not dismiss the state court proceedings during the middle of an unargued and unbriefed appeal on the basics of a motion filed by one of the losing parties. Such a decision hardly creates any "federal question of substance."

As for the third judgment or order sought to be reviewed herein, the refusal of the Court of Appeals for the Tenth Circuit to issue the extraordinary writ of prohibition or to grant an injunction is not the type of decision this Court ought to review by certiorari. Rule 19 of this Court states that such review will only be had: where the decision is in conflict with the decision of another circuit court of appeals; where an important question of state law has been decided in conflict with the applicable state or territorial law; where an important question of federal law should be settled by this Court; where the circuit court has decided a question of federal law in conflict with a decision of this Court; or where the circuit court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power by supervision.

Of these various bases for review, the only possible one present in the instant case is the last. We submit, however, that the action of the court of appeals in refusing to interfere with the state court was entirely proper and in full accordance with the accepted and usual course of judicial proceedings.

This Court has upheld the use of stay orders pending the outcome of actions in another court. *Landis* v. *North American Company,* 299 U.S. 248, 57 S.Ct. 163, 81 L.Ed. 153 (1936). Among the decisions of the courts of appeals upholding the actions of federal district court judges in staying proceedings pending the outcome of state court actions are *Amdur* v. *Lizars,* 372 F.2d 103 (4th Cir. 1967); *Glen Oaks Utilities, Inc.* v. *City of Houston,* 280 F.2d 330 (5th Cir. 1960); *Ray* v. *Hasley,* 214 F.2d 366 (5th Cir. 1954); *Jewell* v. *Davies,* 192 F.2d 670 (6th Cir. 1951); *Mottolese* v. *Kaufman,* 176 F.2d 301 (2d Cir. 1949).

Thus, even if the petition before the Court were not premature, this is not the proper type of case for this Court to review. It presents no issues of public importance and involves no conflicting decisions between two courts of appeals, between state and federal courts, or between this Court and a court of appeals.

III.

The Kansas Courts Have Exclusive Jurisdiction over the Real Property Which Is the Subject Matter of This Action.

Even if the petition herein were not premature and even if this action were of sufficient public or judicial importance to justify review by this Court, there has been no error committed by the lower federal courts.

Judge Templar was clearly correct in ruling that the attempted class action could not be maintained where there were only eight sisters in the class. Even petitioner makes no complaint of that ruling.

Although Judge Templar's written decision (R. 41) did not expressly state that the action was dismissed, it is the contention of the respondents that there can be no other reasonable construction of his ruling. In the first

place, the order was entered in determining a motion to dismiss filed by certain of the defendants.

In the second place, Judge Templar obviously considered the ruling to be a dismissal. He expressly granted the plaintiffs the right to file an amended complaint for themselves individually. If the action were not dismissed, there would have been no reason for such leave to file an amended complaint to have been requested or granted. Moreover, in the Order Granting Stay (R. 237), Judge Templar dismissed the rule of priority applicable to in rem actions and at least implied that the state court action was entitled to priority because of having been commenced before the amended complaint was filed in the federal court case. Judge Templar thus seems to have twice construed his own order to be a dismissal.

IV.

Petitioner Is Not Entitled to Any Relief on the Merits.

Although we recognize that this Court does not want an extended discussion of the merits of actions in briefs in opposition, we will explain briefly why the Rooks County trial court correctly held against petitioner in the full trial there on the merits.

Briefly stated, petitioner's basic claim for relief is that the quiet title action which barred his claim to the real property in question was "void on its face" because of failure to join three indispensable parties. He also claims that the judgment was procured by fraud in that the mother of the defendants induced her daughters not to defend the action.

The three persons petitioner claims were indispensable parties to the action were James E. Atherton (the minor son of the life tenants, George and Hattie Atherton, who

conveyed their entire interest in the property to Hindman and Lynd), Mary Dunlap and Mary Hillman Casey. James E. Atherton died a minor and without issue in 1934 or about ten years before the conveyance and quiet title suit in question. Obviously, since his remainder interest, if any, would have passed by intestacy to his parents, he was not an indispensable party

Similarly, another of the alleged indispensable parties was Mary Dunlap who was the daughter of one of the defendants in the original quiet title action who was actually served with process. Mary Dunlap had no interest in the property as her father was still alive and still vested of record with whatever interest might have descended to him, so there was no reason for her to be joined.

Almost exactly the same situation obtains for the third of the so-called indispensable parties, Mary Hillman who is also known as Mary Casey. She was the daughter of Barbara Hillman who was also a named defendant in the 1944 quiet title action. Since any remainder interest would have passed to Barbara Hillman and since there was no conveyance or other document of record transferring her interest to her daughter Mary, there was no reason to join Mary as a party. Clearly, these two daughters of named defendants had no vested or contingent interest in the property and were not even proper parties to that 1944 action much less indispensable parties.

But even if those three persons were somehow indispensable, the failure to join them would not have made the judgment void as claimed by petitioner. A court that proceeds to try an action that has not had all indispensable parties joined is in error, but the failure to join indispensable parties does not deprive the court of the power to enter a binding judgment over the parties who are properly

joined. E.g., *Doerr* v. *Warner,* 76 N.W.2d 505 (Minn. 1956); *Dyer* v. *Stauffer,* 19 F.2d 922 (6th Cir. 1927), cert. denied 275 U.S. 551, 48 S.Ct. 114, 72 L.Ed.2d 421 (1927); *State of Washington* v. *United States,* 87 F.2d 421 (9th Cir. 1936); *Shields* v. *Barrow,* 17 How. 130, 141, 15 L.Ed. 158 (1855); 2 *Barron & Holtzoff,* Federal Practice and Procedure, § 516, p. 163; and 3A *Moore's Federal Practice,* Par. 19.07-2 [O] p. 2258. Cf., *Bogart* v. *Southern Pac. Co.,* 228 U.S. 137, 146, 33 S.Ct. 497, 57 L.Ed. 768 (1913).

As for the claim of petitioner that Hattie Atherton fraudulently tricked her children into not defending the 1944 quiet title action, the district judge of the Rooks County district court who heard the evidence on that point said:

> "The Court finds that each of the eight daughters of George and Hattie Atherton (including Mary Catherine Sheperd, deceased) had actual knowledge of the transaction entered into by their parents with the plaintiff Lynd. They also knew that as a part of that transaction a quiet title suit was commenced and prosecuted in which they were joined and summoned as defendants. The Court also finds that the eight daughters failed to appear and plead or assert any title to the property in the quiet title action and that they did so knowingly and intentionally. None of the defendants acted upon any advice or statement of the plaintiffs. None of the eight children were under any disability which would have prevented them from asserting any claims or rights which they might have had or believed they had at the time of the quiet title suit. The defendants and cross-petitioners in this action have failed to sustain the burden of showing that they were misled, defrauded or overreached by anyone in connection with their failure to appear and litigate the 1944 quiet title action."
>
> "* * * There is no creditable evidence adduced by the defendants and cross-petitioners in this action tending to establish that George Atherton or Hattie Atherton

were acting as the agents or as conspirators with either of the plaintiffs in connection with any statements made by the parents to their children concerning the Lynd transaction or the quiet title suit. The evidence adduced by all of the parties convinces the Court that Lynd and Hindman were at all times acting in good faith. The Court also believes that at the time of the tax foreclosure, the transaction with Lynd and the quiet title action, George Atherton and his wife were acting in good faith and pursued the course which they believed to be the most reasonable and best one available to them to salvage some interest in the land for themselves and for their children."

(R. 1077-1078. Our Appendix, pp. A7, A8.)

As the learned Kansas district court judge correctly observed, the transaction in which George and Hattie Atherton saved their home from sale at tax foreclosure was entered into in good faith by all parties and with the full knowledge and approval of the eight daughters including petitioner's mother. There was nothing wrongful or fraudulent about any part of the transaction. Years later, after oil production was obtained on the property, the daughters and some of their children apparently have changed their minds and now wish they had found some other way for their parents to keep from losing the family farm for nonpayment of taxes. It is too late for such second thoughts, however, and petitioner and his relatives have no basis for their varicus actions.

CONCLUSION

All of the substantive issues involved herein are still pending before the Supreme Court of the State of Kansas as well as before both the United States District Court for the District of Kansas and the United States Court of Appeals for the Tenth Circuit, and none of such issues is of

sufficient importance to merit review by this Court. Moreover, petitioner's underlying claims for relief are most tenuous and entirely lacking in merit. It is, therefore, respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE DISTRICT COURT OF ROOKS COUNTY, KANSAS

D. A. HINDMAN and CHARLEY A. LYND,
Plaintiffs,
vs.
MARY CATHERINE SHEPARD, ET AL.,
Defendants.
No. 9873

MEMORANDUM OPINION

This is a quiet title suit. To the petition certain of the defendants filed answers and cross petitions. The cross petitions primarily allege ownership in the property and fraud on the part of the plaintiffs.

A pretrial was held in which all of the questions of fact and of law were fully and ably presented to the Court. A question of the right to a trial by jury was raised by some defendants. The Court held that a jury would not be called except on the question of the amount of damages to which cross-petitioners would be entitled if the ownership was found to be in defendants.

The case was fully tried thereafter to the Court. The Court requested briefs to be accompanied by requested Findings of Fact and Conclusions of Law. Since the trial the Court has been furnished excellent briefs and requests. The first briefs were received in late May, and the last was received from defendant Marvin J. Morse during the week of July 22d. To this brief under the Court's order plaintiffs have a right yet to reply. However, under date of June 26, 1968, plaintiffs advised the Court that plaintiffs

would make no further reply, so it is assumed this last brief of Marvin J. Morse will not be answered.

The Court having found for the plaintiffs is largely adopting the requested Findings of Fact and Conclusions of Law as submitted by plaintiffs with certain amendments and deletions thought either improper or irrelevant.

Findings of Fact

1. This is an action brought to quiet the title to certain real estate situated in Rooks County, Kansas. Plaintiff Charley A. Lynd, is the owner, in possession, of the entire surface estate and an undivided 3/8th interest in the minerals and mineral estate in the following described land:

> All that portion of Section Thirty-two (32), Township Nine (9), Range Nineteen (19), Rooks County, Kansas, lying south of the Union Pacific Railroad right-of-way.

Plaintiff D. A. Hindman, is the owner, in possession, of an undivided 1/4th interest in the minerals and mineral estate in and under the above described land. The defendants are collectively the owners of an undivided 3/8th interest in the minerals and mineral estate in and under the above described land, but claim to be the owners of the entire fee simple interest in said land, which claim is asserted in answers and cross-petitions filed in this action. The original defendants in this action are the eight daughters of George W. Atherton and Hattie Atherton, deceased. During the pendency of this action, one of the daughters, Mary Catherine Shepard, died. By proper proceedings and order of the Court, her surviving children and heirs were substituted and served as parties defendant. This is an action brought to quiet or determine title under the provisions of K.S.A. 60-1002. Proper service has been made on each of the defendants and substituted defendants.

2. At one time, the real estate in question was owned by James E. Atherton, who died testate on July 21, 1925. The will of James E. Atherton was admitted to probate in Rooks County, Kansas. The property in question was devised by paragraph Sixth of the will, which reads:

> "Sixth: I give, devise and bequeath to my son, George W. Atherton, of Sharon Springs, Kansas, to be held by him and for his use during his natural life time, provided he pays the taxes as they become due and payable on the following described land: All that portion of Section Thirty-two (32), Township Nine (9), Range Nineteen (19), Rooks County, Kansas, lying south of the Union Pacific Railroad right-of-way. After the death of my son, the said George W. Atherton, it is my will and I hereby direct that the last above described real estate shall descend to the children of his body and that the same be held by them and for their use for a period of twenty (20) years from the time of the death of the said George W. Atherton, after which time the same children of my son, George W. Atherton, shall come into full possession of the said described real estate and may hold the same or dispose thereof in any manner they wish."

The present defendants are the children and grandchildren of George W. Atherton.

3. George Atherton took possession of the real estate following the death of his father James E. Atherton, and continued in possession of the property until the occurrence of certain events in 1944. For at least 12 years prior to 1944, George Atherton failed to pay the taxes on the property. The George Atherton family was in difficult financial straits in 1944, and for several years before, and the taxes were unpaid because of this condition.

4. In the fall of 1943, the Board of County Commissioners of Rooks County, Kansas, brought an action (Case

No. 7783, styled *Board of County Comm. v. Silvers*) to foreclose its lien for delinquent taxes on this and other tracts of real estate in Rooks County. At that time the delinquent taxes on this property totaled $3,045.59. Proper service was made on George Atherton and his wife Hattie Atherton, and on each of their eight children.

5. Shortly after the commencement of the tax foreclosure action, George Atherton and his wife employed D. A. Hindman, an attorney in Stockton, Kansas, and one of the plaintiffs in this action, to represent them as counsel in the tax foreclosure case. Hindman, with the knowledge and consent of his clients, prepared and filed an answer in the tax foreclosure action admitting that George Atherton was the owner of the property and requesting that if the property be sold at tax foreclosure, any surplus in sale proceeds above the amount of delinquent taxes and costs of the proceeding be paid to George Atherton. In due course, an order was entered in the tax foreclosure proceeding directing that any surplus sale proceeds be paid to George W. Atherton.

6. George Atherton did not have the money to pay the delinquent taxes on the real estate; prior to the foreclosure sale he and his wife undertook to arrange a private sale of the property under circumstances which would preserve some interest in the mineral estate for themselves and their children. The tax foreclosure sale was to be held February 11, 1944. George W. Atherton and his wife Hattie Atherton traveled to Wakeeney to meet with the plaintiff Lynd. The plaintiff Hindman was not present at the meeting. On February 10, the day before the sale, Hattie Atherton called Hindman long distance, and informed him that the Atherto[illegible] and the Lynds had arrived at an agreement by which Lynd would purchase the property and, as consideration for the purchase, would pay

the delinquent taxes and an additional amount of $3,000 to George and Hattie Atherton. It was also agreed that George and Hattie Atherton would retain or receive by conveyance from Lynd, an undivided 3/8ths interest in the oil, gas and other minerals under the property for a period of twenty (20) years from the date of the transaction and as long as there was production on the property. Hattie Atherton requested Hindman to advance the funds necessary to pay the taxes and redeem the property before sale because it appeared likely that weather conditions would prevent the Lynds and Athertons from making the trip from Wakeeney to Stockton by the time of the sale. Hindman followed the instructions of his clients and on the following day, February 10, 1944, advanced the funds necessary to pay the delinquent taxes and caused the redemption of the property to be entered in the name of George W. Atherton.

7. The Lynds and the Athertons went to Stockton and met with the plaintiff Hindman to arrange for closing of the sale transaction. Lynd reimbursed Hindman for the funds advanced in payment of the delinquent taxes. A special warranty deed was prepared, executed and delivered by George W. Atherton and Hattie Atherton, transferring title to the real estate in question to the plaintiff Lynd. Hindman advised the parties that because of the terms of the will of James E. Atherton and doubts or legal questions as to the character of the estate created by the Sixth paragraph of the will which passed title to this property, it would be necessary to commence and successfully conclude a quiet title action in order to vest in the purchasers a merchantable title. During this meeting, a contract of employment between Lynd and his wife and Hindman was prepared and executed, providing, in substance, that Hindman would be entitled to receive for his services in connection with the title action an undivided

1/4th interest in the oil, gas and mineral rights in the land for a period of twenty (20) years and as long as oil or gas is produced from the property if he were successful in clearing the title to the property. During the meeting the plaintiff Lynd requested George and Hattie Atherton to contact their eight daughters and explain the transaction to them in order to be certain that there would be no misunderstandings or hard feelings in the family.

8. The plaintiff Hindman prepared and filed the papers necessary to commence an action to quiet the title. (Case No. 7807, styled *Lynd* v. *Hillman*, in the District Court of Rooks County, Kansas) The eight daughters of George and Hattie Atherton, along with other parties, were named and joined as defendants. The records on file with the Clerk of this Court in Case No. 7807 (of which the Court takes judicial notice with the consent and stipulation of the parties) reflect that each of the eight children of George W. Atherton and Hattie Atherton were duly and properly served or summoned in the quiet title suit in the manner provided by law. In addition to service by publication on the defendants residing outside the state of Kansas, plaintiff Hindman mailed by registered mail copies of the publication notice to all such defendants, and receipts with signatures of these defendants appearing thereon were returned and filed in Case No. 7807. During the pendency of the quiet title suit, George and Hattie Atherton contacted each of their daughters to inform them of the transaction with Lynd and the pending quiet title suit. On February 16, 1944, Hattie Atherton wrote plaintiff Lynd, as follows:

> "We have seen and heard from five of the children and I have written the other three everything is perfectly satisfactory with them and they will do all they can to help clear the title for you either by ignoring the notice the sheriff serves on them and if it is neces-

> sary later for them to sign the deed, they will do that. All they want is for the agreement between you, Elida (Lynd), George and I put into writing giving George and I and our heirs 3/8th of the oil and gas rights or mineral rights for twenty years or as long after as the land produces." (Plaintiffs' Exh. 5.)

On April 7, 1944, Hindman, acting on the instruction of his clients, prepared the agreement requested in Hattie Atherton's letter to Lynd. This contract was signed by George Atherton and his wife, and Lynd and his wife. It provided, in substance that the Lynds would convey to the Athertons 3/8th interest in the oil, gas and mineral rights for a period of twenty (20) years and as long as oil or gas is produced from the premises, immediately after completion of the quiet title proceeding.

9. The Court finds that each of the eight daughters of George and Hattie Atherton (including Mary Catherine Shepard, deceased) had actual knowledge of the transaction entered into by their parents with the plaintiff Lynd. They also knew that as a part of that transaction a quiet title suit was commenced and prosecuted in which they were joined and summoned as defendants. The Court also finds that the eight daughters failed to appear and plead or assert any title to the property in the quiet title action and that they did so knowingly and intentionally. None of the defendants acted upon any advice or statement of the plaintiffs. None of the eight children were under any disability which would have prevented them from asserting any claims or rights which they might have had or believed they had at the time of the quiet title suit. The defendants and cross-petitioners in this action have failed to sustain the burden of showing that they were misled, defrauded or overreached by anyone in connection with their failure to appear and litigate the 1944 quiet title action.

10. The evidence is clear and uncontroverted, and the Court finds, that all communications with the eight daughters of George and Hattie Atherton which took place during the transaction with Lynd and the commencement and prosecution of the quiet title action, were communications between the children and their parents. Neither Hindman nor Lynd had any communications or made any representations to the children of George and Hattie Atherton concerning the Lynd transaction or the quiet title suit. There is no creditable evidence adduced by the defendants and cross-petitioners in this action tending to establish that George Atherton or Hattie Atherton were acting as the agents or as conspirators with either of the plaintiffs in connection with any statements made by the parents to their children concerning the Lynd transaction or the quiet title suit. The evidence adduced by all of the parties convinces the Court that Lynd and Hindman were at all times acting in good faith. The Court also believes that at the time of the tax foreclosure, the transaction with Lynd and the quiet title action, George Atherton and his wife were acting in good faith and pursued the course which they believed to be the most reasonable and best one available to them to salvage some interest in the land for themselves and for their children.

11. On April 12, 1944, judgment was entered in the quiet title action (Case No. 7807) quieting title to the fee simple interest in the real estate in the plaintiff Lynd, and declaring the defendants in that action to have no right, title or interest in the property. No appeal was taken from that judgment. At the time of the trial and final hearing in that action, the Lynds and Athertons were present in the courtroom. There was no misstatement or misrepresentation by anyone present concerning the interest, position or failure to appear and plead, of the children of George and Hattie Atherton. The plaintiff Lynd entered

into possession of the property and has remained in possession and has paid taxes on the surface and 3/8th of the mineral estate since that date. The plaintiff Hindman entered into possession of an undivided 1/4th interest in the mineral estate.

12. On or about June 15, 1944, the Lynds and the Athertons concluded the transaction between them. Lynd paid George Atherton the sum of $3,000, the balance of the purchase price of the property. Lynd and his wife executed royalty or mineral deeds to George W. Atherton and his wife, and to plaintiff Hindman, which conformed to and carried out the terms of the written agreements between them.

13. At various times since 1944, the plaintiffs and their wives and George and Hattie Atherton joined in the execution of oil and gas leases covering all or parts of the property in question. Oil production was first discovered on the property in 1951, but these wells were subsequently plugged and abandoned. In 1960 production was again discovered, and there are several producing wells on the property at the present time.

14. When George and Hattie Atherton received the payment of $3,000 from the plaintiff Lynd, in the summer of 1944, they paid to each of their daughters the sum of $100. The children knew and understood that this money was a part of the consideration received by their parents in the Lynd transaction. When oil was discovered and first produced from the property in 1951, George and Hattie Atherton distributed portions of the royalties received by them to their eight daughters, who accepted and retained these payments with knowledge of the source from which they came. George Atherton died in 1961, and Hattie Atherton died in 1963. Following the death of their parents, the eight daughters of George and Hattie Atherton

succeeded to the 3/8ths mineral and royalty interest acquired by their parents in the Lynd transaction. Since the probate of their parents' estates, they have been paid, and have accepted and retained, their proportionate share of the oil and gas royalties accruing to the 3/8th royalty interest owned by their parents. The defendants executed division orders with the purchasers of crude oil from the premises under which they were paid their respective shares of the 3/8th royalty interest owned by their parents.

15. The defendants failed to take any action or commence any legal proceedings to assert any right, title or interest in the property or set aside the judgment in Case No. 7807 for more than twenty (20) years after the Lynd transaction and the entry of judgment in Case No. 7807. On March 25, 1960, the defendant Margaret Christensen (then Margaret Jewkes) executed and delivered a Quit Claim Deed to the property in question in which her father George W. Atherton was named as the grantee.

Conclusions of Law

1. The Court has jurisdiction of the parties and this action.

2. The defendants and cross-petitioners have failed to sustain the burden of proof to show that they were defrauded or in any way unlawfully deprived of an interest or expected interest in the real estate involved in this action.

3. The claims of the defendants and cross-petitioners, insofar as they seek to recover any title or estate in the property greater than the 3/8th mineral and royalty estate presently vested in them by inheritance from their parents, or insofar as they seek to claim any title adverse to the present title and estate of the plaintiffs, have been barred by laches, adverse possession and the statutes of

limitation, and specifically, by the provisions of K.S.A. 60-260, 60-507 and 60-513.

4. The defendants' claims in this action, and their cross-petitions, amount to an improper collateral attack upon the judgment of this Court in Case No. 7807, *Lynd* v. *Hillman, et al.*

5. The judgment in Case No. 7807 is res judicata and conclusive of the defendants' claims asserted and litigated in this action.

6. The defendants' cross-petitions are denied and plaintiffs are entitled to judgment against the defendants and each of them for the relief sought in their petition. Counsel for plaintiffs will prepare and submit an appropriate Journal Entry of Judgment.

Dated this ..... day of August, 1968.

/s/ C. G. Birney
District Judge

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FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

Nos. 1031 and 1081

MARVIN J. MORSE,
Petitioner,

vs.

D. A. HINDMAN, et al.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITIONER'S PETITIONS FOR A WRIT OF CERTIORARI

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I.

STATEMENT

Petitioner, Marvin J. Morse, has filed two petitions for writ of certiorari which are numbered 1031 and 1081. The first petition seeks review of judgments in cases from the following courts: United States District Court for the District of Kansas, *Mary Catherine Shepard, et al.* v. *Charley A. Lynd, et al.*, Case No. T-3987; Supreme Court of the State of Kansas, *D. A. Hindman* v. *Mary Catherine*

Shepard, et al., Case No. 45622; The United States Court of Appeals for the Tenth Circuit, *Marvin J. Morse* v. *District Court of Rooks County*, Case No. 20-69. The second petition appears to seek review of the same case in the Supreme Court of the State of Kansas, *Hindman* v. *Shepard, et al.* This brief in opposition to certiorari will be directed to both petitions.

II.

ARGUMENT

A chronology of the cases sought to be reviewed begins March 4, 1966, when a class action was commenced in the United States District Court for the District of Kansas styled *Mary Catherine Shepard, et al.* v. *Charley Lynd, et al.*, Case No. T-3987, seeking a determination that conveyances and a quiet title action involving a tract of property located in Rooks County were void. The class consisted of eight sisters, three of whom were residents of Kansas and five nonresidents. Answers were filed by the respondents herein challenging the class action, and on October 21, 1966, an order was entered dismissing the class action as being improper with leave granted in the order that the plaintiffs could file an amended complaint as individuals.

On October 28, 1966, before any amended complaints were filed in the Federal District Court case, these respondents commenced an action in the District Court of Rooks County, Kansas to quiet their title to the same Rooks County property. All the members of the class that had brought the action in the United States District Court were joined as defendants. Answers and counterclaims were filed by the defendants seeking to establish an adverse title to the property.[1]

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1. Mary Catherine Shepard, one of the eight sisters, died while a party in both the U. S. District Court case and the Rooks County case. Petitioner, Marvin J. Morse, who is one of her children has become a party in both cases by orders of substitution.

On November 1, 1966, an amended complaint was filed in the U. S. District Court case by two members of the class. Subsequently, other members of the class joined as plaintiffs in the U. S. District Court case. After the actions were on file in both Courts, motions were filed by the plaintiffs in the United States District Court case to enjoin the State Court action on the ground that the Federal Court had acquired exclusive jurisdiction and a stay order was necessary to aid and protect that jurisdiction. The U. S. District Court overruled all these motions.

In September, 1968, a trial was held in the Rooks County District Court case on all the issues raised by the claims and counterclaims. Petitioner, Morse, was present at the trial and represented himself. Other defendants, some of which were witnesses at the trial, were represented by attorneys. The trial resulted in a judgment being entered in favor of these respondents. The memorandum opinion of the District Court of Rooks County is included in the appendix as Exhibit "A".

After the Rooks County judgment had been filed, these respondents filed a motion to stay the proceedings in the U. S. District Court pending a final determination of the Rooks County case. In the meantime notices of appeal to the Supreme Court of the State of Kansas from the Rooks County judgment were filed by all the defendants in that action including petitioner, Marvin J. Morse. The U. S. District Court sustained the motion to stay its proceedings on the grounds that the Rooks County judgment would be conclusive on the issues raised in the case before it. A notice of appeal to the United States Court of Appeals for the Tenth Circuit has been filed by petitioner from the U. S. District Court orders denying an injunction against the Rooks County action, overruling petitioner's motion for summary judgment and the order staying proceedings.

This appeal has just recently been docketed with the Clerk of the Court of Appeals for the Tenth Circuit.

Soon after the filing of the notice of appeal, petitioner commenced an action in the United States Court of Appeals for the Tenth Circuit for a writ of prohibition on injunction to restrain the Rooks County District Court from exercising any jurisdiction over the Rooks County property. In denying the writ the United States Court of Appeals noted that the U. S. District Court had previously refused to stay the Rooks County action. After the writ was denied, petitioner then filed a motion in the Supreme Court of the State of Kansas to dismiss the State Court action on the grounds of failure of jurisdiction. The Kansas Supreme Court denied the motion.

In summary, the status of all the litigation at the time the petitions for certiorari were filed was as follows:

(a) The U. S. District Court case had been stayed by order of that Court.

(b) An appeal had been docketed with the U. S. Court of Appeals for the Tenth Circuit from the orders of the U. S. District Court staying its own proceedings, overruling a motion for summary judgment and overruling motions to enjoin the Rooks County action.

(c) The District Court of Rooks County case had been tried and a judgment entered in favor of these respondents. The judgment is in the process of appeal to the Supreme Court of the State of Kansas.

Rules 19 and 20 of the Rules of the Supreme Court of the United States set forth considerations governing review on certiorari. Rule 20 states:

> "A writ of certiorari to review a case pending in a court of appeals, before judgment is given in such

> court, will be granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate processes and to require immediate settlement in this court."

The judgments of the U. S. District Court for the District of Kansas sought to be reviewed by certiorari prior to any judgment by the U. S. Court of Appeals for the Tenth Circuit are orders granting a stay of proceedings and denying an injunction against the Rooks County Court. It is obvious the judgments are not of imperative public importance to justify circumventing the normal appellate process.

The writ of prohibition denied by the U. S. Court of Appeals for the Tenth Circuit involved the same as the order by the U. S. District Court denying an injunction against the Rooks County Court. Neither Court found it necessary to protect the jurisdiction of the Federal Courts by enjoining the State Court action. The decision by the Court of Appeals for the Tenth Circuit is not within the consideration mentioned in Rule 19 1.(b) for governing review on certiorari.

The decision of the Supreme Court of Kansas sought to be reviewed is an order denying the petitioner's Motion to Dismiss for Lack of Jurisdiction. Prior to this motion, the petitioner had filed a notice of appeal to the Supreme Court of Kansas from the judgment of the District Court of Rooks County, Kansas. By the filing of the motion the petitioner obviously was attempting to place the issue of jurisdiction of Rooks County Court before the Supreme Court of Kansas without adhering to the State's appellate process. The Supreme Court of Kansas by dismissing the motion has not made a final adjudication of the case or for that matter the issue of jurisdiction. The decision is clearly not of the character as set forth in Rule 19 1.(a) of the Rules of the Supreme Court of the United States.

III.

CONCLUSION

The decisions sought to be reviewed by the petitions for writ of certiorari do not meet the requirements or considerations as provided in Rules 19 and 20 of the Rules of the Supreme Court of the United States and the petitions for writ of certiorari should be denied.

Respectfully submitted,

ROBERT MARTIN
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Attorney for Respondents

IN THE DISTRICT COURT OF ROOKS COUNTY, KANSAS

D. A. HINDMAN and CHARLEY A. LYND,
Plaintiffs,
vs.
MARY CATHERINE SHEPARD, ET AL.,
Defendants.

No. 9873

MEMORANDUM OPINION

This is a quiet title suit. To the petition certain of the defendants filed answers and cross petitions. The cross petitions primarily allege ownership in the property and fraud on the part of the plaintiffs.

A pretrial was held in which all of the questions of fact and of law were fully and ably presented to the Court. A question of the right to a trial by jury was raised by some defendants. The Court held that a jury would not be called except on the question of the amount of damages to which cross-petitioners would be entitled if the ownership was found to be in defendants.

The case was fully tried thereafter to the Court. The Court requested briefs to be accompanied by requested Findings of Fact and Conclusions of Law. Since the trial the Court has been furnished excellent briefs and requests. The first briefs were received in late May, and the last was received from defendant Marvin J. Morse during the week of July 22d. To this brief under the Court's order plaintiffs have a right yet to reply. However, under date of June 26, 1968, plaintiffs advised the Court that plaintiffs would make no further reply, so it is assumed this last brief of Marvin J. Morse will not be answered.

The Court having found for the plaintiffs is largely adopting the requested Findings of Fact and Conclusions of Law as submitted by plaintiffs with certain amendments and deletions thought either improper or irrelevant.

Findings of Fact

1. This is an action brought to quiet the title to certain real estate situated in Rooks County, Kansas. Plaintiff, Charley A. Lynd, is the owner, in possession, of the entire surface estate and an undivided 3/8ths interest in the minerals and mineral estate in the following described land?

> All that portion of Section Thirty-two (32), Township Nine (9), Range Nineteen (19), Rooks County, Kansas, lying south of the Union Pacific Railroad right-of-way.

Plaintiff, D. A. Hindman, is the owner, in possession, of an undivided 1/4th interest in the minerals and mineral estate in and under the above described land. The defendants are collectively the owners of an undivided 3/8ths interest in the minerals and mineral estate in and under the above described land, but claim to be the owners of the entire fee simple interest in said land, which claim is asserted in answers and cross-petitions filed in this action. The original defendants in this action are the eight daughters of George W. Atherton and Hattie Atherton, deceased. During the pendency of this action, one of the daughters, Mary Catherine Shepard, died. By proper proceedings and order of the Court, her surviving children and heirs were substituted and served as parties defendant. This is an action brought to quiet or determine title under the provisions of K.S.A. 60-1002. Proper service has been made on each of the defendants and substituted defendants.

2. At one time, the real estate in question was owned by James E. Atherton, who died testate on July 21, 1925.

The will of James E. Atherton was admitted to probate in Rooks County, Kansas. The property in question was devised by paragraph Sixth of the will, which reads:

> "Sixth: I give, devise and bequeath to my son, George W. Atherton, of Sharon Springs, Kansas, to be held by him and for his use during his natural life time, provided he pays the taxes as they become due and payable on the following described land: All that portion of Section Thirty-two (32), Township Nine (9), Range Nineteen (19), Rooks County, Kansas, lying south of the Union Pacific Railroad right-of-way. After the death of my son, the said George W. Atherton, it is my will and I hereby direct that the last above described real estate shall descend to the children of his body and that the same be held by them and for their use for a period of twenty (20) years from the time of the death of the said George W. Atherton, after which time the same children of my son, George W. Atherton, shall come into full possession of the said described real estate and may hold the same or dispose thereof in any manner they wish."

The present defendants are the children and grandchildren of George W. Atherton.

3. George Atherton took possession of the real estate following the death of his father James E. Atherton, and continued in possession of the property until the occurrence of certain events in 1944. For at least 12 years prior to 1944, George Atherton failed to pay the taxes on the property. The George Atherton family was in difficult financial straits in 1944, and for several years before, and the taxes were unpaid because of this condition.

4. In the fall of 1943, the Board of County Commissioners of Rooks County, Kansas, brought an action (Case No. 7783, styled *Board of County Comm.* v. *Silvers*) to foreclose its lien for delinquent taxes on this and other tracts of real estate in Rooks County. At that time the

delinquent taxes on this property totaled $3,045.59. Proper service was made on George Atherton and his wife Hattie Atherton, and on each of their eight children.

5. Shortly after the commencement of the tax foreclosure action, George Atherton and his wife employed D. A. Hindman, an attorney in Stockton, Kansas, and one of the plaintiffs in this action, to represent them as counsel in the tax foreclosure case. Hindman, with the knowledge and consent of his clients, prepared and filed an answer in the tax foreclosure action admitting that George Atherton was the owner of the property and requesting that if the property be sold at tax foreclosure, any surplus in sale proceeds above the amount of delinquent taxes and costs of the proceeding be paid to George Atherton. In due course, an order was entered in the tax foreclosure proceeding directing that any surplus sale proceeds be paid to George W. Atherton.

6. George Atherton did not have the money to pay the delinquent taxes on the real estate; prior to the foreclosure sale he and his wife undertook to arrange a private sale of the property under circumstances which would preserve some interest in the mineral estate for themselves and their children. The tax foreclosure sale was to be held February 11, 1944. George W. Atherton and his wife Hattie Atherton traveled to Wakeeney to meet with the plaintiff Lynd. The plaintiff Hindman was not present at the meeting. On February 10, the day before the sale, Hattie Atherton called Hindman long distance, and informed him that the Athertons and the Lynds had arrived at an agreement by which Lynd would purchase the property and, as consideration for the purchase, would pay the delinquent taxes and an additional amount of $3,000 to George and Hattie Atherton. It was also agreed that George and Hattie Atherton would retain or receive by

conveyance from Lynd, an undivided 3/8ths interest in the oil, gas and other minerals under the property for a period of twenty (20) years from the date of the transaction and as long as there was production on the property. Hattie Atherton requested Hindman to advance the funds necessary to pay the taxes and redeem the property before sale because it appeared likely that weather conditions would prevent the Lynds and Athertons from making the trip from Wakeeney to Stockton by the time of the sale. Hindman followed the instructions of his clients and on the following day, February 10, 1944, advanced the funds necessary to pay the delinquent taxes and caused the redemption of the property to be entered in the name of George W. Atherton.

7. The Lynds and the Athertons went to Stockton and met with the plaintiff Hindman to arrange for closing of the sale transaction. Lynd reimbursed Hindman for the funds advanced in payment of the delinquent taxes. A special warranty deed was prepared, executed and delivered by George W. Atherton and Hattie Atherton, transferring title to the real estate in question to the plaintiff Lynd. Hindman advised the parties that because of the terms of the will of James E. Atherton and doubts or legal questions as to the character of the estate created by the Sixth paragraph of the will which passed title to this property, it would be necessary to commence and successfully conclude a quiet title action in order to vest in the purchasers a merchantable title. During this meeting, a contract of employment between Lynd and his wife and Hindman was prepared and executed, providing, in substance, that Hindman would be entitled to receive for his services in connection with the title action an undivided 1/4th interest in the oil, gas and mineral rights in the land for a period of twenty (20) years and as long

as oil or gas is produced from the property if he were successful in clearing the title to the property. During the meeting the plaintiff Lynd requested George and Hattie Atherton to contact their eight daughters and explain the transaction to them in order to be certain that there would be no misunderstandings or hard feelings in the family.

8. The plaintiff Hindman prepared and filed the papers necessary to commence an action to quiet the title. (Case No. 7807, styled *Lynd* v. *Hillman,* in the District Court of Rooks County, Kansas) The eight daughters of George and Hattie Atherton, along with other parties, were named and joined as defendants. The records on file with the Clerk of this Court in Case No. 7807 (of which the Court takes judicial notice with the consent and stipulation of the parties) reflect that each of the eight children of George W. Atherton and Hattie Atherton were duly and properly served or summoned in the quiet title suit in the manner provided by law. In addition to service by publication on the defendants residing outside the state of Kansas, plaintiff Hindman mailed by registered mail copies of the publication notice to all such defendants, and receipts with signatures of these defendants appearing thereon were returned and filed in Case No. 7807. During the pendency of the quiet suit, George and Hattie Atherton contacted each of their daughters to inform them of the transaction with Lynd and the pending quiet title suit. On February 16, 1964, Hattie Atherton wrote plaintiff Lynd, as follows:

> "We have seen and heard from five of the children and I have written the other three everything is perfectly satisfactory with them and they will do all they can to help clear the title for you either by ignoring the notice the sheriff serves on them and if it is necessary later for them to sign the deed, they will do that.

> All they want is for the agreement between you, Elida (Lynd), George and I put into writing giving George and I and our heirs 3/8th of the oil and gas rights or mineral rights for twenty years or as long after as the land produces." (Plaintiffs' Exh. 5)

On April 7, 1944, Hindman, acting on the instruction of his clients, prepared the agreement requested in Hattie Atherton's letter to Lynd. This contract was signed by George Atherton and his wife, and Lynd and his wife. It provided, in substance, that the Lynds would convey to the Athertons 3/8ths interest in the oil, gas and mineral rights for a period of twenty (20) years and as long as oil or gas is produced from the premises, immediately after completion of the quiet title proceeding.

9. The Court finds that each of the eight daughters of George and Hattie Atherton (including Mary Catherine Shepard, deceased) had actual knowledge of the transaction entered into by their parents with the plaintiff Lynd. They also knew that as a part of that transaction a quiet title suit was commenced and prosecuted in which they were joined and summoned as defendants. The Court also finds that the eight daughters failed to appear and plead or assert any title to the property in the quiet title action and that they did so knowingly and intentionally. None of the defendants acted upon any advice or statement of the plaintiffs. None of the eight children were under any disability which would have prevented them from asserting any claims or rights which they might have had or believed they had at the time of the quiet title suit. The defendants and cross-petitioners in this action have failed to sustain the burden of showing that they were misled, defrauded or overreached by anyone in connection with their failure to appear and litigate the 1944 quiet title action.

10. The evidence is clear and uncontroverted, and the Court finds, that all communications with the eight daughters of George and Hattie Atherton which took place during the transaction with Lynd and the commencement and prosecution of the quiet title action, were communications between the children and their parents. Neither Hindman nor Lynd had any communications or made any representations to the children of George and Hattie Atherton concerning the Lynd transaction or the quiet title suit. There is no creditable evidence adduced by the defendants and cross-petitioners in this action tending to establish that George Atherton or Hattie Atherton were acting as the agents or as conspirators with either of the plaintiffs in connection with any statements made by the parents to their children concerning the Lynd transaction or the quiet title suit. The evidence adduced by all of the parties convinces the Court that Lynd and Hindman were at all times acting in good faith. The Court also believes that at the time of the tax foreclosure, the transaction with Lynd and the quiet title action, George Atherton and his wife were acting in good faith and pursued the course which they believed to be the most reasonable and best one available to them to salvage some interest in the land for themselves and for their children.

11. On April 12, 1944, judgment was entered in the quiet title action (Case No. 7807) quieting title to the fee simple interest in the real estate in the plaintiff Lynd, and declaring the defendants in that action to have no right, title or interest in the property. No appeal was taken from that judgment. At the time of the trial and final hearing in that action, the Lynds and Athertons were present in the courtroom. There was no misstatement or misrepresentation by anyone present concerning the interest, position or failure to appear and plead, of the children of George and Hattie Atherton. The plaintiff Lynd entered

into possession of the property and has remained in possession and has paid taxes on the surface and 3/3ths of the mineral estate since that date. The plaintiff Hindman entered into possession of an undivided 1/4th interest in the mineral estate.

12. On or about June 15, 1944, the Lynds and the Athertons concluded the transaction between them. Lynd paid George Atherton the sum of $3,000, the balance of the purchase price of the property. Lynd and his wife executed royalty or mineral deeds to George W. Atherton and his wife, and to plaintiff Hindman, which conformed to and carried out the terms of the written agreements between them.

13. At various times since 1944, the plaintiffs and their wives and George and Hattie Atherton joined in the execution of oil and gas leases covering all or parts of the property in question. Oil production was first discovered on the property in 1951, but these wells were subsequently plugged and abandoned. In 1960 production was again discovered, and there are several producing wells on the property at the present time.

14. When George and Hattie Atherton received the payment of $3,000 from the plaintiff Lynd, in the summer of 1944, they paid to each of their daughters the sum of $100. The children knew and understood that this money was a part of the consideration received by their parents in the Lynd transaction. When oil was discovered and first produced from the property in 1951, George and Hattie Atherton distributed portions of the royalties received by them to their eight daughters, who accepted and retained these payments with knowledge of the source from which they came. George Atherton died in 1961, and Hattie Atherton died in 1963. Following the death of their parents, the eight daughters of George and Hattie Atherton

succeeded to the 3/8ths mineral and royalty interest acquired by their parents in the Lynd transaction. Since the probate of their parents' estates, they have been paid, and have accepted and retained, their proportionate share of the oil and gas royalties accruing to the 3/8ths royalty interest owned by their parents. The defendants executed division orders with the purchasers of crude oil from the premises under which they were paid their respective shares of the 3/8ths royalty interest owned by their parents.

15. The defendants failed to take any action or commence any legal proceedings to assert any right, title or interest in the property or set aside the judgment in Case No. 7807 for more than twenty (20) years after the Lynd transaction and the entry of judgment in Case No. 7807. On March 25, 1960, the defendant Margaret Christensen (then Margaret Jewkes executed and delivered a Quit Claim Deed to the property in question in which her father George W. Atherton was named as the grantee.

Conclusions of Law

1. The Court has jurisdiction of the parties and this action.

2. The defendants and cross-petitioners have failed to sustain the burden of proof to show that they were defrauded or in any way unlawfully deprived of an interest or expected interest in the real estate involved in this action.

3. The claims of the defendants and cross-petitioners, insofar as they seek to recover any title or estate in the property greater than the 3/8ths mineral and royalty estate presently vested in them by inheritance from their parents, or insofar as they seek to claim any title adverse to

the present title and estate of the plaintiffs, have been barred by laches, adverse possession and the statutes of limitation, and specifically, by the provisions of K.S.A. 60-260, 60-507 and 60-513.

4. The defendants' claims in this action, and their cross-petitions, amount to an improper collateral attack upon the judgment of this Court in Case No. 7807, *Lynd* v. *Hillman*, et al.

5. The judgment in Case No. 7807 is res judicata and conclusive of the defendants' claims asserted and litigated in this action.

6. The defendants' cross-petitions are denied and plaintiffs are entitled to judgment against the defendants and each of them for the relief sought in their petition. Counsel for plaintiffs will prepare and submit an appropriate Journal Entry of Judgment.

Dated this ..... day of August, 1968.

/s/ C. E. Birney
District Judge

SUPREME COURT, U.S.
FILED
APR 25 1969
JOHN F. DAVIS, CLERK

No. 1031 and 1081

In the Supreme Court of the United States

OCTOBER TERM, 1968

MARVIN J. MORSE,
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vs.

D. A. HINDMAN and CHARLEY A. LYND,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND TO THE SUPREME COURT OF THE STATE OF KANSAS

Motion for Leave to File Petition for Rehearing and Petition for Rehearing

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Pinole, California
Pro-se Petitioner

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No. 1031 and 1081

In the Supreme Court of the United States

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND TO THE SUPREME COURT OF THE STATE OF KANSAS

Motion for Leave to File Petition for Rehearing

Marvin J. Morse, pro se petitioner herein, respectfully moves for leave to file the annexed petition for rehearing of the order of this court denying the petitions for writs of certiorari in these cases, entered on April 1, 1969. The petition herein submitted does not fully comply with the requirements of rule 58(2) in that it is not supported by a statement of counsel of record for the reason that petitioner herein has not been represented by counsel in either the Federal or State court proceedings nor before this court.

MARVIN JAMES MORSE
980 Barkley Ct.
Pinole, California
Pro-se Petitioner

No. 1031 and 1081

In the Supreme Court of the United States

OCTOBER TERM, 1968

MARVIN J. MORSE,
Petitioner,

vs.

D. A. HINDMAN and CHARLEY A. LYND,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND TO THE SUPREME COURT OF THE STATE OF KANSAS

Petition for Rehearing

Petitioner respectfully requests that the Court grant rehearing of the order dated April 1, 1969, which denied certiorari in these cases and that the court now grant certiorari.

In the respondents reply brief counsel therein has argued that the only attack made by petitioner on the 1944 State Court suit to construe paragraph sixth of the will and to quiet title to the disputed property in Charley A. Lynd, is the failure to join those three parties whom counsel names on pages 11 and 12 of their reply brief.

However, in the original petition (complaint) in petitioners amended complaint, in the brief filed, and in oral arguments before the Court petitioner attacked that judgment as void on its face for failing to name the indispensable parties in a suit to construe a will, to wit: George W. Atherton as life-tenant to the property; George and Hattie Atherton as heirs of a deceased vested remainderman and as grantors of a mortgage; along with those three parties listed by counsel for respondents as *contingent beneficiaries* under paragraph eleventh of the will. That the judgment is void on its face for failing to make service or get jurisdiction over the spouses of the non-resident remaindermen who were named as defendants therein and whose names and addresses appear in the affidavit for constructive service, and for numerous other defects apparent in the records involving the will and proceedings had under it.

That the Federal Courts, having diversity jurisdiction, can entertain a suit to set aside a State court judgment that is void on its face is well established. *Falsetti v. Indiana Oil Purchasing Co.*, 215 F. Supp. 420; *Arenas v. United States,* 95 F. Supp. 962; that once jurisdiction has attached in an *in rem* suit in Federal Court that court has exclusive jurisdiction was the subject of the original petitions; and the Federal District court cannot properly abate its proceedings in favor of the State Courts is well established by previous decisions of this court.

For the reasons set forth, rehearing and certiorari should be granted.

MARVIN JAMES MORSE
980 Barkley Ct.
Pinole, California
Pro-se Petitioner

CERTIFICATE

Pursuant to Rule 58, I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in paragraph 2 of Rule 58.

MARVIN JAMES MORSE
Pro-se Petitioner